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VOL. 99 (2d Series) April 1985 No. 1

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(99 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 99 (2d Series)
Pages 1 to 475

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SUBJECT DIGEST

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—*Minority B/cers of East St. Louis, Inc.*
BC Docket No. 82-378

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Commission upholds Private Radio Bureau's decision not to begin revocation proceeding against Aeronautical Advisory radio station licensee. Although licensee did not notify airport owner of its Aeronautical Advisory radio station application within time frame specified by Section 87.251(e) of the Commission's Rules, it substantially complied with that section by giving actual notice. License revocation is not warranted.
—*City of Kerrville*

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Class I-N AM stations established in Alaska with increased interference protection; high latitude skywave propagation curves adopted for use in Alaska.
—*AM Stations In Alaska*
MM Docket No. 83-807

Alaska, Class I-N Stations

(See: Alaska, AM Protection Standards-*AM Stations in Alaska*)

Alaska, Skywave Propagation

(See: Alaska, AM Protection Standards-*AM Stations in Alaska*)

AM Station, Authorization

Review Board affirmed *ID's* grant of AM application, but awarded winner decisive §307(b) preference for proposing first local transmission service to Orange — largest and most developed community without local radio outlet. Affirmed disqualification of applicant

which proposed 5 kW nighttime power but failed to justify §73.21(a)(2)(ii)(c) waiver.
—*Alessandro B/cing Company*
MM Docket No. 83-249

AM Station, Class III, Regional
(See: Alaska, AM Protection Standards-*AM Stations in Alaska*)

Application, Acceptance of
Application for review denied. Low power TV applications which are not complete and sufficient will not be accepted for filing. An application which is found to cause interference to an existing TV translator station is defective and unacceptable for filing. An application which has been returned as defective cannot be accepted *nunc pro tunc* if resubmitted with an amendment to correct defect.
—*Kinetications, Inc.*

Application, Amendment of, Substantial Changes
In hearing matter of mutually exclusive CP applications for television station in Washington, D.C., Review Board affirmed ALJ's grant. Applicant for Arlington, Va. was not entitled to a 307(b) preference over Washington applicants. Moreover, where applicant was found financially qualified by a new financial proposal at express invitation of ALJ, Board would not remand to explore sufficiency of old proposal.
—*Washington's Christian TV Outreach*
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Application Conflicting
Review Board grants appeal from an interlocutory ruling and sets aside ALJ's order that would have forced an applicant to choose which of two applications it would continue to prosecute. Board holds that ALJ lacked authority to force an election and that the applications were neither contingent nor conflicting.
—*Gene Sudduth Co., Inc.*
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Application, Incomplete

Application for review denied. Low power TV/TV translator applications that do not contain required certifications are not complete and, therefore, not acceptable for filing. *Lottery Report and Order*, 93 FCC 2d 952 (1983) provided adequate notice to potential applicants the need to file certain supplemental certifications. Random selection process is now used, therefore, maximizing the number of applicants is no longer a goal in order to seek the most qualified applicant. —*Rochelle C. Salzer*

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Civic Participation

Review Board affirmed *ID* and granted FM application of integrated sole proprietor earning substantial minority and slight broadcast experience preferences. Loser, also, 100% integrated, has 80% female enhancement and a small local residence and civic participation and a minor auxiliary power preference. Local residence accruing after application filing date merits slight credit only.
—*MTF Enterprises*
MM Docket No. 83-646

Common Carrier

Report and Order adopted detariffing embedded customer premises equipment (CPE) owned by Western Union and the international record carriers. Carriers should follow existing accounting regulations for removing assets from regulated service. Methodology adopted for valuating the CPE should be selected by reference to the principles adopted in detariffing of AT&T's embedded CPE.
—*Customer Premises Equipment*
CC Docket No. 81-893

Commission adopted order providing for removal of embedded customer premises equipment owned by Independent telephone companies and tariffed at the state level.
—*Telecommunications Equipment*
CC Docket No. 81-893

Common Carrier, Accounting Regulation Rules, Amendment of

Report and Order establishes new accounts to record carriers' access revenues and expenses required in Docket 78-72 *(Access Charge Order).* These changes revise Part 31 of the Commission's Rules and Regulations and corresponding revisions to the Annual Report Form M and FCC Report 901.

—Amendment of Part 31

BC Docket No. 83-1347

Common Carrier, Depreciation Rates

This Order denies petitions to revise the depreciation rates for Southern Bell and Southwestern Bell.

—AT&T Co.

Common Carrier, Interconnection

Commission rescinds existing prescriptions which have governed interconnection arrangements between and among domestic and international record carriers so that an intercarrier agreement can be implemented.

—Interconnection Arrangements

CC Docket No. 82-122

Common Carrier, Interconnection, Customer-Provided Equipment

(See: Common Carrier-*Telecommunications Equipment*)

Common Carrier, International Record Carriers

(See: Common Carrier, Interconnection-*Interconnection Arrangements*)

(See also: Common Carrier-*Customer Premises Equipment*)

Common Carrier, Operating Expenses

Memorandum Opinion and Order adopted concerning staff's investigation of preoperational expenditures incurred on behalf of AT&T's separate subsidiary.

—AT&T Co.

Comparative Criteria

Applicant with no media holdings receives substantial and decisive preference over one owning only broadcast station in proposed community. Staffing issue against winner is denied because plan was not on its face incapable of effectuation.

—WFSP, Inc.

MM Docket No. 83-689

Comparative Hearing

(See also: Abuse of Process-*Minority B/cers of East St. Louis, Inc.*)

Review Board affirmed Initial Decision and granted comparative applicant proposing 100% minority ownership participation in management. Winner received integration credit for 85% owner who would reside during work week in proposed community but would commute on weekends to be with her family, 63 miles away.
—*WRLJ, Inc.*
BC Docket No. 82-312

(See also: Abuse of Process-*Minority B/cers of East St. Louis, Inc.*)

Comparative Issue, Contingent

Review Board holds that dispositive Section 307(b) preference should not be given where needs showing is inadequate and favored community has population of only 752 persons, and grants construction permit under contingent comparative issue to applicant that has best ownership integration proposal.
—*Ruarch Associates*
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Contour, Interference

Application for review denied. In calculating HAAT of radiation center of the antenna along pertinent radials, Commission's rules provide that elevations between 2 to 10 miles from antenna site shall be employed. Commission does not consider terrain shielding in its computer evaluation of low power television and television translator applications, since there is no universally accepted method of predicting effects of terrain shielding.
—*Holston Valley B/cing Corp.*

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(See: Contour, Interference-*Holston Valley B/cing Corp.*)

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(See: Common Carrier-*Customer Premises Equipment*)

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(See: AM Station, Authorization-*Alessandro B/cing Company*)

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Diversification, of Control of Mass Media, See Also Control

In hearing matter of mutually exclusive CP applications for new television station in Riverside, California, Review Board affirmed ALJ's grant. Integration proposals of two applicants, which are based on gifts of stock, are not credited. The case, itself, however, turns on integration criterion and is razor thin close. The only other preference awarded (a very slight one) is on diversification. No demerit is imposed on a public file issue; and the Board refused to add an ex parte issue.

—*KIST CORP.*

BC Docket No. 81-863

Domestic Public Land Mobile Service

Commission eliminated separate frequency allocation structure 22.501 in Public Land Mobile Service. All carriers can apply for frequencies which were allocated separately to wireline and nonwireline carriers. Changes in Rural Radio Service rules were also effected. Commission denied Petitions for Reconsideration of interim procedures established for filing of applications during pendency of rulemaking.

—*Public Land Mobile Service*

CC Docket No. 83-1146

Employment, Equal Employment Opportunity Rule, Compliance Ordered

Petition to deny certain license renewal applications dismissed and/or denied. Where minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities and women during the license term, appropriate remedial sanctions will be ordered.

—*Texas Broadcast Stations*

Employment, Minority, Acceptable Level by Licensee (EEO)

License renewal application deferred pending review of other matters. Petition to deny alleging licensee failed to comply with Commission's EEO rule denied but licensee required to submit periodic EEO reports. Co-owned and co-located FM station also required to submit EEO reports.

—*Metrogeneral Communications of Nashville, Inc.*

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(See also: Comparative Issue, Contingent-*Ruarch Associates*)

(See also: Application, Amendment of, Substantial Changes-*Washington's Christian TV Outreach*)

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(See also: Employment, Equal Employment Opportunity Rule, Compliance Order-*Texas Broadcast Stations*)

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(See: AM Station, Authorization-*Alessandro B/cing Company*)

AM Station, Authorization
Comparative Hearing
Disqualification Technical or Engineering
Rules, Waiver of, Denial
Transmission First Local

Review Board affirmed *ID's* grant of AM application, but awards winner decisive §307(b) preference for proposing first local transmission service to Orange — largest and most developed community without local radio outlet. Affirmed disqualification of applicant which proposed 5 kW nighttime power but failed to justify §73.21(a)(2)(ii)(c) waiver.

—*Alessandro B/cing Company*
MM Docket No. 83-249

FCC 84R-71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Alessandro Broadcasting Company San Jacinto, California	MM Docket No. 83-249 File No. BP-810206AL
New Radio Corporation La Mirada, California	MM Docket No. 83-250 File No. BP-810209AP
Western Radio Group San Marcos, California	MM Docket No. 83-251 File No. BP-810209AE
Par Broadcasting Company KUDE, Oceanside, California	MM Docket No. 83-253 File No. BP-810209AH

Orange County Broadcasting Corporation Orange, California	MM Docket No. 83-254 File No. BP-810209AK

For Construction Permit

Appearances

Harry G. Sells, on behalf of Alessandro Broadcasting Company; *Harry F. Cole*, on behalf of New Radio Corporation; *Dennis P. Corbett* and *Carl R. Ramey*, on behalf of Western Radio Group; *B. Dwight Perry* and *Christopher C. Smallwood*, on behalf of Par Broadcasting Company; *Seymour M. Chase* and *Robert A. Zauner*, on behalf of Orange County Broadcasting Corporation; and *Y. Paulette Laden* and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: October 3, 1984; Released: October 11, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This proceeding currently involves the mutually exclusive applications of Alessandro Broadcasting Company (Alessandro), New Radio Corporation (New Radio), Western Radio Group (Western), and Orange County Broadcasting Corporation (Orange County) for authority to construct a new AM broadcast station to operate on 830 kHz in the southern California communities of San Jacinto, La Mirada, San Marcos, and Orange, respectively, and of Par Broadcasting Company (Par) to improve the facilities of its AM Station KUDE,[1] Oceanside, California, by shifting frequency from 1320 kHz to 830 kHz. By Hearing Designation Order, 48 Fed. Reg. 13260, published March 29, 1983, these applications were designated for consolidated hearing on the following issues: (a) to determine whether Alessandro should be granted a waiver of the 1 kilowatt (kW) nighttime power ceiling for Class II-B stations established by Section 73.21(a)(2)(ii)(C) of the Rules, 47 CFR 73.21(a)(2)(ii)(C); (b) air hazard issues against Par and Orange; (c) an issue to determine which

[1] Although the Hearing Designation Order in this proceeding lists Dolph-Pettey Broadcasting Company as the licensee of Station KUDE, the station was sold and the license was assigned to Par prior to designation. The ALJ therefore substituted Par for Dolph-Pettey as a party-applicant. *I.D.*, n. 1.

proposal would best provide a fair, efficient, and equitable distribution of radio service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b); and (d) a contingent comparative issue.[2] Presiding Administrative Law Judge James F. Tierney (ALJ) added a real party-in-interest issue against New Radio, as well as an issue to determine the effects of a New Radio principal's criminal conviction on its basic and/or comparative qualifications. *See I.D.*, para. 3. The ALJ subsequently resolved by summary decisions the air hazard issues against Par and Orange County in favor of the applicants. *See I.D.*, para. 4.

2. The Initial Decision (I.D.), FCC 84D-20, released March 28, 1984, found Alessandro technically disqualified because it had failed to justify its waiver request to operate with nighttime power in excess of 1kW, resolved the real party-in-interest issue favorably to New Radio, and found that its principal's criminal conviction did not require its disqualification. Second, New Radio, Western, and Orange County were found to enjoy decisive Section 307(b) preferences over Alessandro and Par. Finally, the ALJ found Orange County to be comparatively the best applicant and granted its application. In reaching this conclusion, he found that Orange County's very slight diversification edge over its nearest rival, New Radio, was outweighed by New Radio's advantage for full-time integration of ownership and management (90% to 56.33%); however, his assignment to New Radio of a substantial comparative demerit, because of the past criminal conviction of its 70% owner and proposed program director, catapulted Orange County into first place on the comparative scale.

3. The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held July 20, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. Because we find that Orange County merits a dispositive Section 307(b) preference for proposing a first local transmission service to Orange, a city of 91,788 persons, we affirm the ALJ's ultimate conclusion that grant of Orange County's application will best serve the public interest, convenience, and necessity.

4. *Alessandro's Engineering Qualifications.* In its application, Alessandro proposed to operate with nighttime power of 5 kW and requested a waiver of Section 73.21(a)(2)(ii)(C) of the Rules which establishes 1 kW as

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[2] In addition, the application of Oceanside Radio, Inc. (MM Docket No. 83-248, File No. BP-801117AC, Oceanside, California) — the "lead" applicant in this proceeding — and those of International Institute of Los Angeles (File No. BP-810209AF), Pro Broadcasters (File No. BP-810209AM), and Santee Broadcasting Company, Inc. of Indiana (File No. BP-810209AN) were designated for hearing and various issues were specified against them. Subsequently, these applications were dismissed with prejudice at the respective applicants' requests. *I.D.*, n. 2.

the nighttime power ceiling for any Class II-B station on a 1-A clear channel that, like Alessandro, will operate in a well-served area such as San Jacinto (that is, will not provide a first nighttime aural reception service to at least 25% of its proposed area or population), 47 CFR 73.21(a)(2)(ii)(C) (referencing 47 CFR 73.37(e)(2)(i)). I.D., paras. 22, 94. The ALJ denied the waiver request and disqualified Alessandro on technical engineering grounds after finding that it failed to demonstrate that a waiver was necessary to provide principal city service to San Jacinto, that a 5 kW operation would potentially preclude future co-channel unlimited-time Class II assignments, and that the adverse consequences of preclusion were not outweighed by proposed additional service to more people. I.D., paras. 23-29, 95-97. In its exceptions, Alessandro urges that the Board should overturn its technical disqualification either by granting its waiver request or by considering its application as one proposing the 1 kW nighttime power permitted by the Rules.[3]

5. We affirm the ALJ's disqualification of Alessandro because, first, it has failed to justify its waiver request and, second, there is no basis for grant of Alessandro's belated request to be considered as a 1 kW applicant. In designating the waiver issue against Alessandro, the Commission stated:

> The applicant has a heavy burden to show that the power it proposes is necessary to provide principal city service and will not impede the Commission's allocation objectives; it may meet the latter by showing either that the higher power would not preclude other possible co-channel unlimited-time Class II assignments or that the improved principal city service entailed by the higher power clearly outweighs any potential service that might be precluded. Since it cannot be determined from the record if waiver of Section 73.21 is warranted, an issue will be specified.

Hearing Designation Order, *supra*, para. 13. *See also Kaye-Smith Enterprises*, 52 RR 2d 1685, 1688 (1983) (strict standard adopted for waiver requests of this nature). To meet this issue, Alessandro had two choices: either present evidence to justify the waiver, or amend its engineering proposal within 30 days after publication of the hearing designation order to comply with the Commission's Rules. *See* Section 73.3522(b)(2) of the Rules, 47 CFR 73.3522(b)(2). It chose the first course, and now concedes that it has failed in this endeavor. *See* note 3, *supra*. This concession is perhaps necessitated by the clear and virtually unchallenged record evidence that a less than 5 kW proposal would essentially cover the principal community and that a 5 kW proposal would seriously preclude the possible inauguration or extension of local service to numerous other communities without any real compensating public

[3] Despite its exception to the denial of its waiver request, Alessandro conceded at oral argument that it "[has not] met the burden of the waiver," and that its principal argument is that its application should be considered on the basis of its purported 1 kW proposal. See Tr. 929 and paragraph 5, *infra*.

interest benefits. Alessandro's purported alternative 1 kW proposal was first raised in its exceptions — to the considerable surprise of the other parties and the Board. Its application did not contain an alternative engineering showing that complied with the 1 kW nighttime power rule, and it never sought to amend to specify this alternative or substitute proposal. Thus, insofar as Alessandro relies on its hearing exhibits to support a 1 kW proposal, that evidence is plainly at variance with its proposal of record and may not be considered. *Cf. Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494, 45 RR 2d 1, 6 (Rev. Bd. 1979). Nor could Alessandro have been allowed to proceed with alternative engineering showings in any case because considerations of administrative convenience, efficiency, and fairness to the parties preclude such an inconsistent and uncertain prosecution.[4] In short, Alessandro's application presents no viable technical proposal and therefore, as the ALJ held, that applicant must be technically disqualified.

6. *Section 307(b) Issue.* The ALJ found that reception service differences were of little decisional value in the instant case because there are at least five aural nighttime and two daytime reception services available in all areas that the five applicants propose to serve. I.D., paras. 119-120. He further ruled that the small reception service advantages of Alessandro and New Radio were essentially *de minimis. Id.* With regard to transmission service, the ALJ held that New Radio, Western, and Orange County, because each of them will provide a first local transmission service to its proposed community, merit equally a dispositive Section 307(b) preference over Alessandro, which failed to show that its proposed community of license, San Jacinto, is a distinct community, and Par, whose proposed community, Oceanside, already has Par's Stations KUDE and KEZL(FM) licensed to it. I.D., paras. 53, 121-122; Orange County Exh. 8, p. 1. He also found that these three preferred applicants could not be further distinguished on Section 307(b) grounds. I.D., para. 127. In reaching this result, he reconsidered his earlier rejection of Orange

[4] Even if Alessandro were now to tender an amendment containing a complete engineering showing based on proposed 1 kW nighttime power, which it has not done, the amendment could not be accepted at this late stage of the proceeding. The re-examination of the application that would be needed and the inherent delay plus the prejudice to other parties that would necessarily follow because such an amendment would alter the evidence under the specified Section 307(b) and standard comparative issues would vitiate the "good cause" needed for the amendment's acceptance. *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983); *see generally Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970). *Cf. Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (applicant may not "sit back and hope that a decision will be in its favor, and then, when it isn't, . . . parry with an offer of more evidence").

County's Section 307(b) demographics Exhibit 23[5] as improper rebuttal and considered the exhibit in awarding Orange County a Section 307(b) preference. I.D., paras. 123, 126.

7. As a first step in resolving the Section 307(b) issue in this case, we consider the exceptions of Alessandro and New Radio that their small advantages in the provision of third, fourth, and fifth daytime reception services should entitle them to decisive preferences.[6] Traditionally, in resolving Section 307(b) issues, the Commission seeks to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's specified community for a new transmission service. *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2605-2608, 22 RR 605, 610-612 (1961); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808, 51 RR 2d 409, 415 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983. The Commission recently simplified the FM service priorities to be considered when making a Section 307(b) choice of communities as follows:

(1) First full-time aural service.

(2) Second full-time aural service.

(3) First local service.

(4) Other public interest matters.

[Co-equal weight would be given to priorities (2) and (3)]

Second Report and Order, *FM Channel Policies/Procedures*, 90 FCC 2d 88, 90-93, 51 RR 2d 807, 809-811 (1982), *recon. denied*, 56 RR 2d 448 (1984). In setting forth these priorities, which now emphasize "aural" service as opposed to only "FM" service, the Commission explicitly recognized "the fact that AM and FM have become joint components of a single aural medium." *Id.* at 92; 51 RR 2d at 810. Therefore, although it does not specifically address the matter of AM allocations, the Report and Order lends support to consideration of these FM priorities in a Section 307(b) determination for an AM channel, such as the frequency here at issue.[7] Because neither Alessandro nor New Radio proposes a first or second full-time aural service (priorities (1) and (2)), provision of a first

[5] The exhibit is referred to as Number 22 in the I.D. and the exceptions. However, it is listed as Number 23 in the docket file and will be so referenced herein.

[6] For the benefit of reviewing authorities, we shall consider Alessandro's Section 307(b) exceptions despite its technical disqualification.

[7] Indeed, the Report and Order recognizes that the Commission's basic FM allocation objectives, which the priorities seek to achieve, are identical to those that traditionally governed AM Section 307(b) choices. *Id.* at 89, n. 4. These historic AM allocation goals were redefined in 1963 to place even greater emphasis on the provision of a first local aural service to as many communities as possible. *See Policy Statement on Section 307(b)*, 2 FCC 2d 190, 191, 6 RR 2d 1901, 1904 (1965), and *AM Station Assignment Standards*, 25 RR 1615, 1626 (1963).

local service (priority (3)) is significantly more important in this proceeding than their provision of additional reception service (priority (4)). See paragraphs 9-11, *infra*. Even without reference to the above priorities, this conclusion becomes still more apparent when consideration is given to the minor size of the proposed reception service advantages, both in absolute numbers (*i.e.*, Alessandro would provide third, fourth and fifth services to slightly more than 800 persons; New Radio would render a fourth service to 354 persons and a fifth service to 3,324) and in proportion to the entire population coverage (over 9 million persons). *See* I.D., para. 54. Thus, we agree with the ALJ that these reception advantages are too insignificant to provide a meaningful Section 307(b) preference and that the reception portion of the Section 307(b) analysis is not decisional in this case.[8]

8. Next, we disagree with the contentions of New Radio and Western that the ALJ erred in reconsidering in the I.D. his previous rejection at hearing of Orange County Exhibit 23 — which contained demographic information about the city of Orange — and in awarding Orange County a Section 307(b) preference based on that exhibit. *See* I.D., para. 123. No party argues that the exhibit is insufficient to show that the city of Orange, Orange County's proposed community of license, is a "separate community" for Section 307(b) purposes. Rather, exceptors contend the exhibit should have been offered in the applicant's direct case and not as a rebuttal exhibit. We would be inclined to be more sympathetic to the exceptor's position if the evidence at issue pertained to the applicant's comparative qualifications (*e.g.*, extent of ownership integration into management) and thus were subject to being upgraded to the prejudice of the other parties. Here, however, the Section 307(b) issue more closely resembles a basic qualifications question. *See FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955) (upholding Commission's right to grant license to applicant whose community had a greater need for additional service without comparing the relative abilities of the applicants to serve their respective communities). Obviously, the city of Orange's demograph-

[8] We also reject New Radio's claim that the ALJ should have awarded it a preference because of its greater nighttime reception service based on the 10 mV/m contour rather than the interference-free contour considered by the ALJ. While New Radio claims a substantial population coverage advantage using the 10 mV/m standard, it does not assert that any of this area presently receives fewer than five aural services. Indeed, Alessandro Exh. 10 at 7-8 indicates that New Radio's entire 10 mV/m contour does receive at least five aural services. In the absence of evidence of underserved areas, we decline to rest our decision on claims of superior population coverage alone. As will be apparent from our discussion of transmission benefits in paragraphs 9-11, *infra*, whatever slight reception service preference New Radio might deserve for its 10 mV/m population advantage, *see DuPage County Broadcasting, Inc.*, 19 FCC 2d 250, 253, 17 RR 2d 229, 233 (Rev. Bd. 1969), is plainly outweighed by Orange County's strong transmission service preference.

ic characteristics are completely beyond the control of the applicant and are not subject to "improvement." Moreover, when Orange County requested reconsideration of the ALJ's adverse ruling in its proposed findings of fact and conclusions of law, the opposing applicants had an opportunity to rebut the exhibit — to the extent there could be anything to raise in rebuttal — in their reply findings. Exceptors, however, offered no such rebuttal and, even now, there is no dispute concerning the accuracy of the exhibit.[9] Finally, New Radio's own Exhibit 5, at 8-11, presents sufficient demographic data about the city of Orange to firmly establish without reference to the disputed Orange County Exhibit 23 that the city is a distinct community for Section 307(b) purposes. Therefore, we affirm the ALJ's reconsideration of his earlier rejection of the exhibit and his reliance upon it in deciding the Section 307(b) issue.

9. Having previously concluded that the reception aspects of the Section 307(b) inquiry are not determinative, we now turn to consideration of the transmission factors. Alessandro proposed as its community of license the city of San Jacinto, which has a 1980 U. S. Census population of 7,098 people but which does not have a local broadcast station. In its Exhibit 7, Alessandro showed that this community is part of the San Jacinto Valley (pop. 61,800), which includes the city of Hemet (pop. 22,700). However, no description of the proposed community's (as distinct from the Valley's) demographic, governmental-political, sociological, or economic structure was provided. Hence, the ALJ concluded that Alessandro had not established that San Jacinto was a separate and distinct community entitled to Section 307(b) consideration. I. D., para. 122. Nevertheless, other record evidence shows San Jacinto to be an incorporated city in Riverside County with a council-manager type of government. The city has an agriculturally-based economy, 7 schools, 14 churches, and a municipal museum, a library, one daily newspaper, and no commercial broadcast station. New Radio Exh. 5 at 11-13. This evidence, which the ALJ did not consider, leads us to depart from the ALJ's conclusion that San Jacinto is not a distinct community. Smaller communities with comparable demographic features have been so regarded, *cf. Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 708-09, 51 RR 2d 389, 393-94 (Rev. Bd. 1982), and we conclude that San Jacinto meets the Commission's traditional test and may be considered a distinct community for Section 307(b) purposes. *See Seven Locks Broadcasting Co.*, 22 RR

[9] Official notice could properly be taken of the U.S. Census and Orange Chamber of Commerce data contained in the exhibit. *Cf. What The Bible Says, Inc.*, 28 FCC 2d 551, 554, 21 RR 2d 652, 657 (Rev. Bd. 1971) (Board reopened record and received into evidence preliminary 1970 U.S. Census figures and college enrollment data reflecting current composition of community). *See also City of New York Municipal Broadcasting System (WNYC)* v. *FCC*, No. 83-1663, slip op. at 29 n. 17 (D.C. Cir. Sept. 21, 1984).

967 (1962).[10]

10. New Radio's proposed community, La Mirada, is an incorporated city in Los Angeles County with a 1980 population of 40,986 and a total land area of 7.78 square miles, and has an independent government, 222 industrial firms, 22 churches, 60 civic and social organizations, and no commercial broadcast station. New Radio Exh. 5 at 1-6. Western's proposed community, San Marcos, is an incorporated city in San Diego County with a 1980 population of 17,479 (1970 pop. was 3,896) and a total land area of about 21 square miles, is governed by a council-manager system, and has a chamber of commerce, its own fire protection district, 50 manufacturing firms, 22 churches and no broadcast station. Western Exh. 4. Oceanside, Par's community, is an incorporated city in San Diego County with a 1980 population of 83,192 and total land area of 30 square miles, and has an independent council-manager form of government, 145 manufacturing plants, a substantial school system, 2 general hospitals, a library, and 39 churches. Par's Stations KUDE and KEZL(FM) are licensed to Oceanside. New Radio Exh. 5 at 6-8. Finally, Orange County's proposed community, Orange, is an incorporated city located 32 miles southeast of Los Angeles and 94 miles north of San Diego with a 1980 U.S. Census population of 91,788 persons and a total land area of 21.2 square miles. Orange has its own separate city government consisting of a mayor and four-member city council, substantial-sized police and fire departments, a substantial educational system including 28 elementary schools, 12 junior and senior high schools, and a total school enrollment of 19,861, 270 manufacturing plants, 3 general hospitals, 3 libraries, 50 churches, and a daily newspaper — but no radio or television station. Orange County Exh. 23; New Radio Exh. 5 at 8-11.

11. Two clear decisional differences in the communities emerge from this review: (1) Oceanside is already served by two broadcast stations — *i.e.*, Par's AM-FM combination; and (2) the communities vary significantly in population — Orange, 91,788; Oceanside, 83,192; La Mirada, 40,986; San Marcos, 17,479; and San Jacinto, 7,098. Par, citing *Miner* v. *FCC*, 663 F.2d 152 (D.C. Cir. 1980), urges that it should not have been automatically penalized by the ALJ for being the licensee of an existing station seeking to improve its facilities. We disagree that *Miner* is relevant. That case involved the Commission's application of its diversification-of-media control objective in a comparative hearing context to an existing licensee seeking to change frequency. Here the Section 307(b) choice focuses on the respective needs of *communities* for service, and not on a comparison of *applicants*. See paragraph 7, *supra*. Moreover, even if Par's argument

[10] We will not, however, grant Alessandro the transmission preference it claims for San Jacinto based on service to 21 nearby communities which lack local service. This novel contention is without precedential support.

supported our non-recognition of its AM station in Oceanside, its FM facility must still be weighed as providing Oceanside with an existing local transmission service. Consequently, Par cannot prevail in this proceeding, because, by contrast, all of its competitors offer a first local service and the Commission and the courts "have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations." *Pasadena Broadcasting Co.* v. *FCC*, 555 F. 2d 1046, 1050-51 (D.C. Cir. 1977). Among the other contestants, the Commission presumes that the most populous community has the greatest need for a first local service, provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes. *See Affinity Communications, Inc.*, 56 RR 2d 510 (Rev. Bd. 1984), and *Cornwall Broadcasting Corp., supra*, 89 FCC 2d at 709-710, 51 RR 2d at 393-394. The largest community present in this case is Orange, and we disagree with New Radio's contention that, apart from mere population differences, there are no other factors favoring Orange over La Mirada. The evidence plainly shows Orange to be significantly more developed than La Mirada (or any of the other communities) in terms of economic, social, political, and educational activities supportive of the population, *see* paragraph 10, *supra*, and these activities bespeak Orange's greater need for a first local radio outlet. Orange County is therefore awarded a decisive Section 307(b) preference. *See Affinity* and *Cornwall, supra; cf. FCC* v. *Allentown Broadcasting Co., supra.*[11] Finally, whatever significance may attach to Western's claim of "phenomenal" growth for San Marcos, the size and concomitant importance of that community (approximately one-fifth that of Orange) cannot match that of the latter.[12] Accordingly, after having

[11] We also deny New Radio's exception that it deserves a preference because its 50 kW daytime power proposal is akin to one previously found by the Commission to protect "United States interests under international agreements by avoiding any possibility of controversy concerning the continued use of the frequency in the Southern California area." Br. at 31, *quoting Goodson-Todman Broadcasting, Inc.*, 45 FCC 2d 573, 581, 28 RR 2d 1597, 1603 (1973). New Radio has failed to offer any evidence that the factual situation in *Goodson-Todman*, which the Commission described as presenting "a unique Section 307(b) situation," *id.* at 577-79, is comparable to the case before us and therefore controlling.

[12] Western states (Br. at 19 n. 22) that after the close of the record in this proceeding the Commission issued a construction permit for a new AM broadcast station in its proposed community, San Marcos. Relying on *Daytona Broadcasting Company, Inc.*, 55 RR 2d 1326, 1337-1339 (Rev. Bd. 1984), it argues that the doctrine of administrative finality forecloses consideration of this development. That case involved the competing interests of administrative finality and the need for compilation of a complete record in the context of a complex comparative coverage issue which involved area and population data, the number of aural services available, and two sets of U.S. Census data. While there are obvious similarities between a comparative coverage inquiry and a reception service analysis under Section 307(b), transmission service data, such as the number of local

considered all decisionally significant exceptions, we affirm the ALJ's ultimate conclusion that grant of Orange County's application will best serve the public interest, convenience, and necessity.[13]

12. ACCORDINGLY, IT IS ORDERED, That the application of Orange County Broadcasting Corporation (File No. BP-810209AK) for a construction permit to establish a new AM broadcast station at Orange, California IS GRANTED; and the applications of Alessandro Broadcasting Company (File No. BP-810206AL), New Radio Corporation (File No. BP-810209AP), Western Radio Group (File No. BP-810209AE), and Par Broadcasting Company (File No. BP-810209AH) ARE DENIED; and

13. IT IS FURTHER ORDERED That:

> Operation with the facilities specified herein is subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Final Acts of the ITU Administrative Conference on Medium Frequency Broadcasting in Region 2, Rio de Janeiro 1981, and to bilateral and other multilateral agreements between the United States and other countries.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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stations, are readily discernible, not subject to dispute, and of key decisional significance. Thus, we are not persuaded that *Daytona* would necessarily bar consideration of the issuance of a construction permit during the course of this proceeding. Nevertheless, because it is not a matter of decisional significance here (since Western does not prevail in any event), we need not decide this question.

[13] Because we award Orange County a dispositive §307(b) preference, we need not reach the standard comparative issue or the exceptions related thereto. *See Kaldor Communications, Inc.*, 56 RR 2d 137, 139 n. 2 (Rev. Bd. 1984); *Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 54 RR 2d 923, *recon. denied*, 95 FCC 2d 222 (Rev. Bd. 1983). Nevertheless, we wish to point out our disagreement with the I.D.'s assignment of a substantial comparative demerit to, and reduction of ownership integration credit for, New Radio because its 70% stockholder and proposed full-time program director was convicted of second degree murder in California in 1971. The ALJ's detailed findings show that Mr. Clarence S. Duke is completely rehabilitated under local law, as evidenced by the issuance of a Certificate of Rehabilitation by the Superior Court of California as well as other substantial evidence. I.D., paras. 32-40. In view of these findings, the ALJ correctly determined that disqualification of New Radio was not warranted, I.D., paras. 98-110, but improperly penalized New Radio under the comparative issue, I.D., paras. 141-146. Because the crime was an isolated event that occurred in the remote past and the state authorities connected with his conviction, imprisonment, parole, and release have determined officially that Mr. Duke is rehabilitated and have restored his civil rights, we find no predictive nexus between his past crime and his current and future fitness to be a Commission licensee and conclude that no demerit should have been assessed against New Radio. *See Violations by Applicants of Laws of U.S.*, 42 FCC 2d 399, 401-403 (1951); *Focus Television Co.*, FCC 84R-59, released August 30, 1984, para. 9 (Rev. Bd.); and *WHW Enterprises, Inc., supra*, 89 FCC 2d at 806, 51 RR 2d at 414 (deference paid to final decisions of other tribunals with primary jurisdiction).

FCC 84D-20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Alessandro Broadcasting Company San Jacinto, California	MM Docket No. 83-249 File No. BP-810206AL
New Radio Corporation La Mirada, California	MM Docket No. 83-250 File No. BP-810209AP
Western Radio Group San Marcos, California	MM Docket No. 83-251 File No. BP-810209AE
Par Broadcasting Company Kude, Oceanside, California	MM Docket No. 83-253 File No. BP-810209AH
Orange County Broadcasting Corporation Orange, California	MM Docket No. 83-254 File No. BP-810209AK
For Construction Permit	

Appearances

Michael L. Glaser and Paul Korman, Esqs. (Gardner, Carton and Douglas) on behalf of Oceanside Radio, Inc.; Harry G. Sells, Esq. (Sells and Gregory) on behalf of Alessandro Broadcasting Company; Harry F. Cole, Esq. (Flood, Bechtel, Ward and Cole) on behalf of New Radio Corporation; Dennis P. Corbett and Carl R. Ramey, Esqs. (McKenna, Wilkinson and Kittner) on behalf of Western Radio Group; Michael Pace and Christopher Smallwood, Esqs. (Dow, Lohnes and Albertson) on behalf of Par Broadcasting Company; Seymour M. Chase, Joyce L. Ausbeck, Marie T. Riordan and Robert Zauner, Esqs. (Seymour M. Chase, P.C.) on behalf of Orange County Broadcasting Corporation; Walter E. Diercks, Esq. (Rubin, Winston and Diercks) on behalf of Pro Broadcasters; Samuel Miller, Esq. (Miller and Fields) on behalf of Santee Broadcasting Company, Inc. of Indiana; and Paulette Laden, Esq., on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

Initial Decision Of Administrative Law Judge James F. Tierney

Issued: March 21, 1984; Released: March 28, 1984

Preliminary Statement

1. This proceeding involves mutually exclusive applications for authority to construct and to operate a new standard broadcast station on 830 kHz in Southern California. Each of the applicants proposes to put the station into a different community. The applicants and their proposed communities of license are Alessandro Broadcasting Company (Alessandro) for San Jacinto; New Radio Corporation (New Radio) for La Mirada; Western Radio Group (Western) for San Marcos; Par Broadcasting Company (Par) for Oceanside[1]; Orange County Broadcasting Corporation (Orange County) for Orange; and Santee Broadcasting Company, Inc. of Indiana (SBC) for Santee.[2]

2. In a *Hearing Designation Order*, 48 Fed. Reg. 13260, published March 29, 1983, the Commission, by the Chief, Mass Media Bureau, designated the competing applications for hearing in a consolidated proceeding on the following issues:[3]

> 4. To determine, with respect to Alessandro Broadcasting Company, whether circumstances exist which warrant waiver of Section 73.21(a)(2)(ii)(C) of the Rules.
>
> 7. To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower heights and locations proposed by [Par Broadcasting Corporation], Orange County Broadcasting Corporation, and Santee Broadcasting Company, Inc. of Indiana.

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[1] Par is the licensee of KUDE, Oceanside, which currently operates on 1320 kHz, and is here seeking changes in the facilities of the station. Par acquired the license for KUDE from Dolph-Pettey Broadcasting Company prior to the designation of the subject applications for hearing and was substituted for Dolph-Pettey as a party to this proceeding (*Order*, FCC 83M-1407, released April 29, 1983).

[2] The applications of International Institute of Los Angeles (Institute) and Pro Broadcasters (Pro), which were also designated for hearing in this proceeding, were dismissed, with prejudice, on requests of the applicants (*Order*, FCC 83M-1312, released April 20, 1983; *Order*, FCC 83M-2511, released July 28, 1983). The application of Oceanside Radio, Inc., was dismissed, with prejudice, pursuant to settlement agreements between Orange County, New Radio and Oceanside (*Memorandum Opinion and Order*, FCC 84M-632, released February 6, 1984). By *Memorandum Opinion and Order*, FCC 84M-1086, released March 2, 1984, SBC's application was dismissed, with prejudice, pursuant to settlement agreements between Orange County, New Radio and SBC. To the extent this Initial Decision discusses the role of SBC, because of that action of dismissal, such references to SBC may be ignored as of no relevance to the disposition here.

[3] The issues directed at the parties who are no longer parties to the proceeding (Institute, Pro and Oceanside) are not set out here.

8. To determine the areas and populations which would receive primary service for each proposal, and the availability of other primary aural services to such areas and populations.

9. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

10. To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

11. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

3. By *Memorandum Opinion and Order*, FCC 83M-2601, released August 5, 1983, the Presiding Judge added the following issues:

To determine the effects of the criminal conviction of Clarence S. Duke on New Radio Corporation's basic and/or comparative qualifications to be a Commission licensee.[4]

To determine whether the named principals in the application of the New Radio Corporation are true parties in interest and whether Sam Gilbert is a real party in interest in the application, and to determine in the light of the evidence adduced thereunder, whether the applicant is qualified to be a licensee of the Commission.[5]

4. The air hazard issue was resolved in favor of Orange County and Par on motions for summary decision (*Memorandum Opinion and Order*, FCC 83M-1730, released May 25, 1983; *Memorandum Opinion and Order*, FCC 83M-3253, released September 19, 1983).

5. A prehearing conference was held on May 25, 1983. An admissions session was held on August 22, 1983, and hearing sessions were conducted on August 23, 24 and 25, 1983. A rebuttal conference was conducted on October 31, 1983, and the record was formally closed at the conference (Tr. 801-802). The record was later reopened, December 5, 1983, to admit New Radio Ex. 14 and Alessandro Surrebuttal Ex. 1 into evidence and was closed on the same date (*Order*, FCC 83M-4463, released December 5, 1983).

6. All parties remaining in the proceeding, with the exception of Par and SBC, filed extensive proposed findings of fact and conclusions as well as reply findings. Parties were directed to file such proposals to aid in the early resolution of the contested issues. Where the parties' proposals faithfully reflect the evidence of record, sufficient to support a fair and just resolution of the issues — particularly as here with multiple parties and multiple issues — those found most useful in that respect may be and have been adopted by the trier-of-fact; this neither disparages nor prejudices anyone. Indeed, it honors the very object of Rule 1.263 (47 CFR 1.263). Here, all submissions are lawyer-like products and liberal adoption,

[4] The burden of proceeding on this issue was placed on Orange County as the party requesting the addition of the issue, and the burden of proof on New Radio.

[5] The burdens of proof and proceeding under this issue were placed on New Radio.

save for editorial and language preferences, has been made from among the several submissions.

7. The Mass Media Bureau's participation was limited to issues 4 and 8 and the comparative coverage aspect of issue 9.

8. For the reasons set forth hereinafter, this, as an Initial Decision SHALL GRANT the application of Orange County Broadcasting Corporation.

Findings of Fact

The Applicants

Alessandro Broadcasting Company:

9. The officers, directors and stockholders of Alessandro are as follows:

Daniel John Sedillos Hemet, California	President, General Manager, a Director and 19 percent stockholder
Consuelo Sedillos Hemet, California	A 12.5 percent stockholder
Gilbert Hurtado Hemet, California	Secretary, Chief Financial Officer, a Director and 18.5 percent stockholder
Michael Rhodes Hemet, California	A Director and 12.5 percent stockholder
Jude Thaddeus A. Powers Hemet, California	A Director and 19 percent stockholder
Ralph Preciado San Jacinto, California	Vice President, a Director and 18.5 percent stockholder

(Alessandro Exs. 1, 2, 3, 4, 5, 6; Tr. 216, 244, 251, 274, 281.)

10. Daniel Sedillos and Consuelo Sedillos were husband and wife but were divorced on May 27, 1981. Amendment of Alessandro application filed, June 3, 1983 (official notice taken). Daniel Sedillos, Consuelo Sedillos, Gilbert Hurtado and Ralph Preciado are Hispanic persons (Alessandro Ex. 1, p. 2; Ex. 2, p.2; Ex. 3, p. 2; Ex. 4, p.2; Tr. 112-113).

11. Alessandro and one James C. Richards have entered into an agreement which provides that, upon grant of the Alessandro application and in consideration for services performed by Richards as the broadcast consultant of Alessandro, Richards will receive 15 percent of the common stock of Alessandro. Under the terms of the agreement, Richards is not required to furnish any funds to Alessandro and, at the conclusion of the

hearing, had provided most of the services called for by the agreement (Alessandro Ex. 11; Tr. 234). After issuance of Richard's stock, *each* Alessandro principal's stock percentage would be reduced by 15 percent. Therefore, the Alessandro principals would then have the following ownership interests:

Daniel John Sedillos	16.150 percent
Consuelo Sedillos	10.625 percent
Gilbert Hurtado	15.725 percent
Michael Rhodes	10.625 percent
Jude Thaddeus A. Powers	16.150 percent
Ralph Preciado	15.725 percent
James C. Richards	15.000 percent

New Radio Corporation:

12. New Radio is a corporation organized under the laws of the State of California. The officers and directors of New Radio and their ownership interests are as follows:

Clarence S. Duke Santa Barbara, California	President, a Director and 70 percent stockholder
Lincoln C. Hilburn Culver City, California	Vice President, Secretary, a Director and 10 percent stockholder
Florence A. Cantrell-May[6] Oakland, California	Treasurer, a Director and 10 percent stockholder
James Roosevelt Newport Beach, California	A Director and 5 percent stockholder
Benjamin F. Dawson, III Seattle, Washington	A 5 percent stockholder

(New Radio Exs. 1, 2, 3 and 4)

13. Clarence S. Duke and Lincoln C. Hilburn are black males and Florence A. Cantrell-May is a black female (New Radio Exs. 1, 2 and 3).

Western Radio Group:

14. Western is a partnership organized under the laws of the State of California. The three partners of Western are:

[6] *Order*, FCC 83M-2132, released June 29, 1983, accepted an amendment filed by New Radio which substituted Cantrell-May for her deceased brother, Evans W. Cantrell, as an officer, director and stockholder in New Radio (official notice granted).

Jeffrey Chandler Oceanside, California	70 percent Managing Partner
William David Dominguez Oceanside, California	25 percent General Partner
Carrie Darlene Uhlinger Carlsbad, California	5 percent General Partner

(Western Ex. 1.)

Par Broadcasting Company:

15. Par is a partnership organized under the laws of the State of California. The partners and their ownership percentages in the partnership, assuming Larry Sushan exercises all his rights pursuant to a Memorandum of Understanding, would be as follows:

Leon W. Parma (as Trustee for MPJM Trust)	40 percent
Leon W. Parma (as Trustee for H&M Trust)	32 percent
La Jolla Capital, Inc.	18 percent
Larry Sushan	10 percent[7]

(Par Ex. 1, Supplement.)

La Jolla Capital, Inc., is owned equally by Leon Parma and Ernest Rady, but all of Rady's stock is held in trust by Parma (Tr. 577). Parma's four children are the beneficiaries of the MPJM Trust and Rady's two children are the beneficiaries of the H&M Trust (Tr. 578).

Orange County Broadcasting Corporation:

16. Orange County is a corporation organized under the laws of the State of California. The current officers, directors and shareholders of Orange County are as follows:

Ernesto S. Cervera North Hollywood, California	President, a Director and 24.05 percent shareholder
David J. Hubbard Mission Viejo, California	Vice President, a Director and 24.05 percent shareholder
J. Fernando Niebla Cypress, California	Secretary, a Director and 16.5 percent shareholder

[7] Sushan has an option to acquire up to a 10 percent interest in the partnership. His actual percentage interest fluctuates depending on the amount of money contributed by all the partners to the partnership (Tr. 574-575).

Joseph C. Somoza Pico Rivera, California	Chief Financial Officer[8] a Director and 24.05 percent shareholder
Manuel E. Sepulveda Santa Ana, California	A Director and 10.31 percent shareholder
Robert A. Savedra	A 1.03 percent shareholder
Frank J. Valdez	A Director

17. On May 1, 1981, the "B" cut-off date in this proceeding (Report No. B-11), the shareholders held the following percentages of stock:

Ernesto S. Cervera	22.99 percent
David J. Hubbard	22.99 percent
J. Fernando Niebla	17.24 percent
Manuel E. Sepulveda	10.35 percent
Joseph C. Somoza	22.99 percent
Robert A. Savedra	3.45 percent

18. Ernesto S. Cervera, J. Fernando Niebla, Manuel E. Sepulveda, Joseph C. Somoza and Robert A. Savedra are persons of Hispanic Heritage (Orange County Ex. 1, pp. 1-2).

Santee Broadcasting Company, Inc. of Indiana:

19. As of the "B" cut-off date in this proceeding, the officers, directors and stock subscribers of SBC were as follows:

Joseph D. Jones[9] Hacienda Heights, California	President, a Director and 25 percent stock subscriber
Thomas W. Mathis Soda Springs, Idaho	Vice President and 15 percent stock subscriber
James W. Beatty Indianapolis, Indiana	Secretary, Treasurer, a Director and 10 percent stock subscriber
Bernard Landman, Jr. Indianapolis, Indiana	A 10 percent stock subscriber
Patricia Welch Indianapolis, Indiana	A Director and 7 percent stock subscriber
Julie Cohen Indianapolis, Indiana	A 7 percent stock subscriber
Patrick E. Chavis, III Indianapolis, Indiana	A Director and 10 percent stock subscriber

[8] Tr. 596.

[9] Joseph D. Jones is a black male (SBC Ex. 8).

Paul Major Columbus, Ohio	A Director and 15 percent stock subscriber
Michael G. Lacy Tooele, Utah	A 1 percent sotck subscriber

(SBC Ex. 5)

20. On July 21, 1983, four of the five members of the Board of Directors of SBC voted to seek a settlement or withdraw the SBC application (Western Ex. 6; Tr. 658). Under a letter dated August 13, 1983, and signed by Joseph D. Jones, its President, SBC filed, August 19, 1983, a Petition for Leave to Amend its application to say that seven of the principals had withdrawn and to show the following ownership structure:

Joseph D. Jones	President and 90 percent stock subscriber
Bernard Landman, Jr.	Vice President, Secretary/Treasurer, and 10 percent stock subscriber

(Western Ex. 5; Tr. 665.)

On August 26, 1983, SBC filed with the Presiding Judge a motion to withdraw its amendment (official notice taken).

21. At the hearing, Jones stated that the seven principals who had withdrawn are to be regarded as having returned to the application as principals (Tr. 637, 639-641). Jones admitted that he had orally agreed to buy out the other stockholders and that he had received, from the withdrawing principals, signed resignations and documents assigning their interests in SBC to Jones, but said that he considered that the assignments were not effective because the documents involved also required his signature and he did not sign any of them (Western Ex. 8; Tr. 660-661, 664, 666). Jones' position was that a tentative agreement had been reached that all seven principals would proclaim intentions to reassume their positions as principals, that none of these principals would be obliged to advance any further funds for the prosecution of the application or the construction and operation of the station, and that at the end of the first year of operation of the station, each of the seven principals would have an option to sell his interest to Jones, but only for the amount which he had loaned to the corporation (Tr. 643-644, 674, 677). At the time of the hearing, Jones had only discussed these terms with two of the seven withdrawing principals and they both asked him to put his proposal in writing for them to review. He had not spoken with the other five principals and was not certain if the proposed arrangement had been conveyed to them (Tr. 669-672, 675-676).

Basic Qualifications Issues

Alessandro Qualifications Issue - Waiver Request:

22. Alessandro proposes to operate with nighttime power of 5 kilowatts (kW). Section 73.21(a)(2)(ii)(C) of the Commission's Rules establishes a 1 kW nighttime power ceiling for Class II-B stations, such as Alessandro's proposed station, on 1-A clear channels in already well-served areas such as Alessandro's proposed community, San Jacinto, California. Alessandro has requested a waiver of the rule. The *Hearing Designation Order* in this proceeding specified an issue to determine whether waiver is warranted.

23. The area within Alessandro's proposed 0.025 mV/m contour within the United States is precluded from use on 830 kHz, Alessandro's proposed frequency, by the prohibited overlap criteria defined in Section 73.37 of the Commission's Rules. The distance of preclusion beyond the 0.025 mV/m contour will depend upon the proposed radiation from the future station toward Alessandro's proposed contour[10] (Alessandro Ex. 9, p. 4).

24. Alessandro Ex. 9 is based upon analysis of nighttime interference-free limitations at various locations in Northern California and Western Nevada, as determined by means of a computer. In this way, the area was established which would receive a nighttime interference-free limitation of greater than 10 mV/m from Alessandro's proposed nighttime 5 kW operation. To the extent indicated, Alessandro's preclusion study takes into account the application of KNCO, Grass Valley, California, for full-time operation on 830 kHz. The Commission has accepted that application (BP-820223AT) (Alessandro Ex. 9, pp. 5-6).

25. Assuming grant of the KNCO application, the area with KNCO's proposed daytime 0.025 mV/m contour will be excluded from future use on 830 kHz. Under the same assumption and considering Alessandro's proposed 5 kW nighttime operation, a future nighttime operation on 830 kHz would be precluded, based on a 10 mV/m nighttime limitation, in an area in East Central California and West Central Nevada (Alessandro Ex. 9, p. 7). The additional preclusion area covers 7,688 square miles with a population of 26,657, based upon the 1980 United States Census (Alessan-

[10] In certain situations, proposals to provide a first AM service in a community may be allowed overlap between 1 mV/m contours and 0.05 mV/m contours of co-channel stations (Section 73.37(b) of the Commission's Rules; New Radio Rebuttal Ex. 3, p. 3; Alessandro Rebuttal Ex. 1, p. 1). This could result in greater preclusion than shown in Alessandro's Ex. 9, a preclusion study which assumes a limiting contour of 0.025 mV/m. See New Radio Rebuttal Ex. 3, p. 4, which, using 0.05 mV/m, concluding that the preclusion area is 16,954 square miles, with a population of 377,810.

dro Rebuttal Ex. 1, p. 5).[11]

26. In the event the KNCO application is not granted, the heavily populated coastline area of California located from Alessandro's proposed 0.025 mV/m contour North, to the 10 mV/m limitation line, would be unable to accommodate a future station on 830 kHz. The reason is that such a station cannot provide the required 25 mV/m signal within the daytime 2 mV/m contour of KGO, San Francisco, California, which operates at 50 kW directional, daytime and nighttime, on 810 kHz. Similarly, a future station on 830 kHz could not provide 25 mV/m service within the 25 mV/m contour of KTRB, Modesto, California, which operates on 860 kHz with 1 kW nighttime and 10 kW daytime directional. The area East of the KGO 2 mV/m contour and the Modesto 25 mV/m contour, South of the 10 mV/m limitation line and North of the Alessandro proposed 0.025 mV/m contour, will receive a nighttime limitation from the Alessandro proposed 5 kW nighttime operation of higher than 10 mV/m[12] (Alessandro Ex. 9, pp. 10-11). The preclusion impact is minimized by the fact that a major portion of Alessandro's proposed nighttime radiation is directed over the Pacific Ocean (Alessandro Rebuttal Ex. 1, p. 7).

27. The Alessandro proposed nighttime service area will provide 10 mV/m service to 69,560 more persons with the proposed 5 kW operation than with a 1 kW operation, which is approximately double the population which would be served with 1 kW nighttime (Alessandro Ex. 9, p. 13).

28. Using the same antenna system, but with power reduced to 1 kW, Alessandro could provide nighttime interference-free coverage of San Jacinto. Assuming such reduced power, the 25 mV/m contour would cover about 80 percent of the city. The business and commercial areas of San Jacinto, which are located along state highway 79, would be well within the 25 mV/m contour. The most distant portion of San Jacinto would be provided a signal strength of about 21.6 mV/m. Small changes in the parameters of the Alessandro antenna pattern would result in 25 mV/m coverage of the entire community of San Jacinto with 1 kW (New Radio Rebuttal Ex. 3, p. 2).

29. A reduction in power to 1 kW would reduce the level of interference by the Alessandro proposal to the pending KNCO proposal to 44.7 percent of the level as now proposed. KNCO would be able to provide service to its normally protected 10 mV/m nighttime contour and beyond,

[11] The figures given in Alessandro Ex. 9 are lower than those later submitted by Alessandro in its rebuttal exhibit.

[12] The type of station proposed by Alessandro is normally protected to its 10 mV/m nightime contour, but the limit may be higher (see Section 73.182(a)(2)(iii) of the Commission's Rules).

rather than being limited to its 11.08 mV/m contour (New Radio Rebuttal Ex. 3, p. 2; Alessandro Ex. 9, pp. 8-9).

New Radio Qualifications Issue - Murder Conviction Issue:

30. On May 14, 1971, Clarence S. "Stan" Duke, President, a Director and 70 percent stockholder of New Radio, was convicted of a violation of Section 187 (second degree murder) of the California Penal Code (California Superior Court, Department 17, File No. A269392).[13] At the time of the crime, Mr. Duke was a full-time sportscaster of Station KNXT-TV, Los Angeles. The crime occurred when Mr. Duke discovered his then-wife in a sexual liaison with another man (New Radio Ex. 9). Mr. Duke killed the other man. Mr. Duke confessed to the crime (*Id.*). Following his conviction, Mr. Duke entered the California Men's Colony at San Luis Obispo in July 1971; was transferred to the California Correctional Institute at Tehachapi in approximately October 1972; was paroled in March 1974, and was released approximately 90 days later.

31. During the 60-90 days prior to his release, Mr. Duke worked at Station KUSC(FM), Los Angeles, as a broadcast engineer on a work furlough program. In approximately September 1974, he assumed a full-time position as Sports Information Director in the athletic department of the University of California at Santa Barbara, a position which he held until approximately 1977. In 1977, he assisted in the research of broadcast properties for Cal-Am Corporation, and from 1978 to 1981 he was self-employed in the research of broadcast properties. In addition, he taught communications-related subjects at Oxnard College in Oxnard, California, in 1981. Since 1982, he has been employed full time as an assistant to the superintendent for Sam Gilbert and Associates, a Los Angeles construction firm (Tr. 486). Since approximately early 1982, he has also been employed by a production company in Santa Barbara as a commentator for sporting events and other presentations in and around Santa Barbara.

32. In July 1979, Mr. Duke received a Community College Instructor Credential (Credential No. 95Duk001), valid for life, from the Board of Governors of the California Community Colleges.[14] According to California state law, an individual seeking such a credential must demonstrate his or her good moral character prior to issuance of the Credential. Mr. Duke received his First Class Radiotelephone Operator's license (Serial No. P1-11-61792) in 1957. That license has been regularly renewed since then and was most recently renewed by the Federal Communications Commission in 1981.

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[13] Unless otherwise indicated, information in this section is taken from New Radio Ex. 7.

[14] A copy of the Credential is included in the record of the instant proceeding as Attachment A to New Radio Ex. 7.

33. On October 1, 1982, the Superior Court of California issued to Mr. Duke a Certificate of Rehabilitation (No. 141962) in which the Court decreed that Mr. Duke has been rehabilitated and is fit to exercise all the civil and political rights of citizenship. The Court also recommended that the Governor of the State of California grant Mr. Duke a full pardon.

34. Further evidence relating to this issue consisting of certain formal papers from a civil suit in the Superior Court of the State of California for the County of Santa Barbara was received (Orange County Exs. 12, 13, 14, 15, 16 and 17). Mr Duke related that the litigation in question involved the question of child support for a child of Mr. Duke (Tr. 530). During the course of that litigation, the child's mother, Constance J. Lockwood, sought the Court's assistance in limiting Mr. Duke's right to visit with the child (Tr. 531). As part of that effort, Ms. Lockwood, who was the plaintiff in the law suit, submitted to the Court a declaration which included, as an attachment, a memo from her in which she made a number of charges concerning Mr. Duke (*Id.*, Orange County Ex. 16). Mr. Duke denied all but two of the allegations set forth in the memo, included in Orange County Ex. 16. In particular, Mr. Duke denied that he ever used the word "nigger" in front of his son; he denied that he spent time at an adult book store; he denied having connections with the Mafia; and he denied that he ever threatened to kill his ex-wife or the judge in his murder trial (Tr. 532-533). He did admit that, as charged in the memo, he knows a certain Jimmy "The Weasel" Fratiano, an individual with apparent connections to organized crime (*Id.*). Mr. Duke had met Mr. Fratiano in prison, that the two had seen each other four or five times since Mr. Duke's release, that Mr. Fratiano had never discussed criminal activity with him and that, in fact, Mr. Fratiano is currently "work[ing] for the good guys" as a government witness (Tr. 533). Mr. Duke also admitted that he may not discipline his child, the last charge raised in Ms. Lockwood's memo.

35. New Radio offered into evidence New Radio Ex. 11 (Tr. 533-537). New Radio Ex. 11 consisted of the final disposition of the child support and visitation case brought by Ms. Lockwood (Tr. 535). The court in that case had awarded him far more visitation time with his child than asked for, notwithstanding the various charges advanced by Ms. Lockwood concerning Mr. Duke's character (*Id.*). And, contrary to the suggestion implicit in Ms. Lockwood's charges, Mr. Duke stated that he has not been charged with, convicted of, or otherwise involved with any criminal activity whatsoever since his release from prison (New Radio Ex. 7, p. 3).

36. In connection both with securing his Certificate of Rehabilitation and with New Radio's efforts to meet its burden of proof under the "conviction issue" herein, Mr. Duke has received written expressions of support from individuals familiar not only with Mr. Duke generally, but also with his particular abilities, with his crime, and with the obligations

imposed on broadcast licensees (New Radio Ex. 7, Attachment C; New Radio Exs. 8, 9, 10, 14). These include a statement describing Mr. Duke as "an outstanding person who is and will continue to be an asset to society and any organization fortunate enough to have him."[15] They include a statement urging that Mr. Duke be granted a pardon by the State of California in order to permit him to return to "membership in a society which sorely needs men of his calibre."[16] They also include four detailed statements, prepared expressly for submission in the instant proceeding, by four individuals who have known Mr. Duke for periods ranging from 14 to 20 years, and who are all directly involved in the broadcast industry (New Radio Exs. 8, 9, 10, 14).

37. New Radio Ex. 8 is the statement of Art Linkletter, who describes himself as a broadcaster, lecturer, author and businessman. In his statement, Mr. Linkletter, while not knowing where Mr. Duke had been employed since 1974, whether he was married or had children or whether Duke belonged to community or civic organizations, acknowledged his awareness of Mr. Duke's crime and conviction, but nonetheless expressed his belief that Mr. Duke is qualified to obtain a broadcast license. During telephonic deposition in lieu of cross examination, Mr. Linkletter reaffirmed this belief (Orange County Ex. 21, pp. 18-19). Basing his opinion on his 14-year acquaintance with Mr. Duke, as well as his own experience as a principal of a broadcast licensee, Mr. Linkletter stated that he likes Mr. Duke, he trusts Mr. Duke, he believes Mr. Duke to be an intelligent and responsible individual, and he feels Mr. Duke should have the opportunity to obtain a broadcast license (Orange County Ex. 21, pp. 12-A, 15, 20). With respect to Mr. Duke's crime, Mr. Linkletter stated that:

> ". . . it was crime of passion. It was a crime that, in my opinion, could happen to any number of ordinarily good law abiding citizens who, caught up in a feeling of betrayal and by somebody he is in love with, on a spur of the moment would do that . . . it happens so many times that I don't consider it, personally, to be any kind of an ordinary criminal record in any way, shape or form."
>
> (Orange County Ex. 21, pp. 9-10.)

With respect to Mr. Duke's rehabilitation, Mr. Linkletter also stated that:

> "[w]e are talking about a man who, in a tremendous burst of rage and fury committed an act for which he was sent to prison and, as we all know, as we should know, if we have done any work in criminal work — and I have been in many prisons and done much work with recidivism. The people least apt to go back to prison are the

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[15] Statement of Dr. Isaiah "Zeak" Simmons, August 28, 1982, submitted in connection with Mr. Duke's successful effort to obtain a Certificate of Rehabilitation (New Radio Ex. 7, Attachment C-2). Dr. Simmons indicated in his statement that he had known Mr. Duke for three years at that time.

[16] Statement of Dr. Al E. Negratti, Director of Athletics, St. Norbert College, August 23, 1982, also submitted in connection with Mr. Duke's successful effort to obtain a Certificate of Rehabilitation (New Radio Ex. 7, Attachment C-5). Dr. Negratti indicated in his statement that he had known Mr. Duke for approximately 30 years at that time.

> murderers who are involved in emotional crimes . . . this was not a crime in the sense it was a premedi[t]ated crime, about somebody's money — it was a one-time thing — anymore if he had run over somebody in a car and killed them at a moment of some sort of a lapse of good judgment."
>
> (Orange County Ex. 21, pp. 23-24.)

38. New Radio Ex. 9 is the statement of George Frederic Putnam, a news reporter/commentator and anchorman with 49 years experience in radio and television. Mr. Putnam has worked at numerous broadcast stations and currently conducts a radio talk show in Los Angeles and serves as a news anchor at Station KTTV-TV, also in Los Angeles (New Radio Ex. 9). Mr. Putnam, who, as with Mr. Linkletter, knew nothing of Duke's "non-work activities," declared that he has known Mr. Duke for approximately 20 years, that he is familiar with Mr. Duke's character and abilities, and that he is also very familiar with the circumstances of Mr. Duke's crime (New Radio Ex. 9, pp. 1-2). Indeed the nature and extent of Mr. Putnam's familiarity with Mr. Duke was such that Mr. Putnam frequently travelled a great distance to visit Mr. Duke in prison (*Id.*). Mr. Putnam also declared that he believed Mr. Duke to be qualified to obtain a broadcast license (*Id.*). During telephonic deposition in lieu of cross examination, Mr. Putnam reaffirmed that his declaration (i.e., New Radio Ex. 9) was "an honest evaluation of [his] association with Mr. Duke" (Orange County Ex. 19, p. 14). Mr. Putnam stated that he believes Mr. Duke is a "sensible, reasonable, honest, decent human being who deserves to go forward with his life" (Orange County Ex. 19, p. 40). With respect to Mr. Duke's crime — with the details of which Mr. Putnam was familiar because, as a news reporter, he had covered the story — Mr. Putnam related that he thought that Mr. Duke's "act was an act of madness in a moment, of absolute anger, a flash, and that a human being shall not be judged by that moment the rest of his life" (Orange County Ex. 19, p. 39).

39. New Radio Ex. 10 is the declaration of Dr. Wallace A. Smith, General Manager of Station KUSC-FM, Los Angeles. He has served in that capacity for ten years (Orange County Ex. 20, p. 21). Dr. Smith declared that he has known Mr. Duke for more than 15 years, that he is familiar with Mr. Duke's character and talents, and that he believes Mr. Duke is qualified to obtain a broadcast license (New Radio Ex. 10). During telephonic deposition in lieu of cross examination, Dr. Smith repeatedly reaffirmed his declaration (Orange County Ex. 20, pp. 6, 18-19, 22, 24). Dr. Smith described his own first-hand observations of Mr. Duke over the period of their acquaintance as the basis for his belief in Mr. Duke's character qualifications (Orange County Ex. 20, p. 23).

40. New Radio Ex. 13 is the declaration of Peter R. Noyes, Executive Editor of news at KNBC-TV in Burbank, California. He likewise declared that he has known Mr. Duke for 18 years, that he is familiar with Mr. Duke's character and talents, and that he believes Mr. Duke is qualified to

obtain a broadcast license (New Radio Ex. 14). Mr. Noyes was not deposed in lieu of cross examination.

New Radio Qualifications Issue - Real Party in Interest Issue:

41. New Radio proposes to finance the construction and initial operation of its proposed station with a $2,000,000 loan from Sam Gilbert (Gilbert) (New Radio Ex. 6, p. 4). Gilbert stated at hearing that he will either loan the money to New Radio personally or "cause [it] to be loaned" from an institution or group of individuals (Tr. 311-312). Interest on the loan from Gilbert to New Radio can be as high as three percent above the prime interest rate (New Radio Ex. 6, p. 4). Gilbert, at the hearing, indicated that the rate would in fact be three percent above the prime rate (Tr. 313).

42. According to Duke, "no security requirements were specified in the [loan] commitment letter, and no such requirements were imposed by Mr. Gilbert." Also, according to Duke, no terms other than those set forth in the commitment letter were attached to the loan (New Radio Ex. 6, p. 4). Gilbert said at one point at hearing that his loan commitment letter to New Radio set forth wholly and completely the terms on which he would loan money to New Radio (Tr. 296-297).

43. Gilbert stated that his attorney told him that "the license itself would be sufficient security for the loan to the station," although Gilbert later stated that he had no plans to require that the license be used as security for the loan (Tr. 299-300, 320). He also stated that the license would have "great value" (Tr. 300) and that he understood that radio station KFI in Los Angeles had sold for $18 million (Tr. 314). Gilbert's attorney had drawn up a "loan package" for use in the event the loan was taken down (Tr. 319-320). He also stated that he would not require personal guarantees from New Radio stockholders because "a personal guarantee is only as good as the net worth of the individual," and the New Radio stockholders' collective net worth is insufficient to make their personal guarantees meaningful (Tr. 321). Gilbert also stated that in the event of a default by New Radio on loan repayment, he would postpone repayment "up until the time the company was successful" (Tr. 322).

44. Duke, on cross examination, stated that Gilbert had imposed no restrictions on New Radio's ability to raise additional money by selling stock (Tr. 526). Duke stated that he never told Gilbert of any plans to sell additional stock (Tr. 510). Duke also stated that Gilbert had "absolutely not" explained to Duke any desires of Gilbert's with respect to the sale of additional stock in New Radio to specific persons (Tr. 526-527).

45. On cross examination, Gilbert stated that "at one point Stan [Duke] mentioned that if he obtained a license and a builder to build it, he would sell stock" (Tr. 329). Gilbert understood Duke to mean that he

would raise additional money through the sale of stock (Tr. 329-330). In addition, Gilbert stated that he would be "personally satisfied" with the sale of additional stock as long as New Radio at all times remained "minority controlled" (Tr. 330). In the event Duke sold enough stock to give non-minorities voting control of New Radio, Gilbert would "divorc[e] himself from any relationship with Mr. Duke" and he would "take into consideration" his "actions" in the event a non-minority controlled New Radio defaulted on repayment obligations to him (Tr. 330-331).

46. Gilbert also stated that he had talked with at least four former and current professional basketball players about the possibility of investing in or possibly working at a New Radio broadcast facility (Tr. 332-338). In his words, "Both Mr. Duke and I are well acquainted with many of the top athletes in the United States — some of whom happen to be black — who I am sure would be willing to participate" (Tr. 331). Gilbert stated that he often counsels basketball players on business matters and that he has "their ear where business is concerned" (Tr. 347).

47. Gilbert stated that one of these players, Lucius Allen, who came to him "seeking a business direction" (Tr. 333), "had heard about the station" and asked Gilbert "if there was a possibility of him acquiring a stock position, and that he would like to be a sportscaster and he is black" (Tr. 332). Mr. Allen was unemployed at the time (Tr. 346). Gilbert discussed Mr. Allen's possible acquisition of New Radio stock "if it were available" and stated that a "position" for Mr. Allen at the station would "be and idea . . . because he's taking training as a broadcaster-sportscaster which he would like to do. He's very articulate" (Tr. 333).

48. Gilbert also discussed the station with Kareem Abdul Jabbar, a professional basketball player, and stated that "it is public knowledge that Kareem has always wanted to be a disc jockey" (Tr. 334). Gilbert also told Marques Johnson, another professional basketball player, that the station might provide an opportunity for him to use his degree in "Theater Arts . . . part of which was in broadcasting" (Tr. 335). Gilbert never mentioned his conversations with these athletes to Duke (Tr. 336). Although he never told Duke about his conversation with Lucius Allen concerning investing in the station, he did "recall one conversation where [Duke] said if he had to raise money could I help him do so. And I said I thought I could' " (Tr. 336).

49. Duke stated on cross examination that Gilbert had provided no assistance "whatsoever" in the formation of New Radio. However, Gilbert revealed on cross examination that Duke had in fact sought his advise on the formation of New Radio and that Gilbert referred Duke to an attorney, Gerald Kay, who does work for Gilbert (Tr. 326). Gilbert could not recall whether he had referred Duke to other attorneys in connection with New Radio's formation (Tr. 327).

50. According to New Radio principals who testified at the hearing, no attempt was made to secure financing for the station from anyone other than Gilbert (Tr. 424, 522). Of the New Radio principals, Duke testified that he paid $7,000 out of his personal funds for his 70 percent of New Radio stock (Tr. 496-497); Lincoln Hilburn testified that he has contributed no money to New Radio so far as that he is obligated to contribute no more than $1,000 for his 10 percent stock interest in New Radio (Tr. 416); Florence Cantrell-May related that she has contributed no money to New Radio so far, and that she is obligated to contribute no more than $1,000 for her 10 percent stock interest in New Radio (Tr. 444).

51. At hearing, Gilbert estimated his net worth to be $30 million (Tr. 299). He recently secured a loan for $56.5 million on the strength of his personal guarantee (Tr. 348). Gilbert has been Duke's employer since June or July of 1982 (Tr. 485). Gilbert owns a construction business and Duke functions as an assistant to a superintendent on one of Gilbert's construction projects (Tr. 486). Duke received no training for the job (Tr. 487). He described himself as an "expediter" on the job. "We sign things in, sign things out, make sure things are done on schedule" (Tr. 486). He said that his salary was "something over $2,000 a month," and that he was not paid on an hourly basis (Tr. 288). Gilbert, however, testified that Duke was paid $15 an hour (Tr. 307). Prior to hiring Duke, Gilbert helped Duke secure another job (Tr. 500). He also, at one point, "helped [Duke] stay alive" and "[a]dvanced monies to [Duke] to [allow Duke] to eat" (Tr. 325).

SBC Qualifications Issue - Air Hazard Issue:

52. The Federal Aviation Administration has determined that SBC's site and tower proposal would not constitute a hazard to air navigation (SBC Ex. 4).

Section 307(b) Considerations

53. Each of the applicants proposes to construct and to operate a new standard broadcast station in a different community in Southern California. Following is a listing of the applicants' proposals, and the 1980 U.S. Census population figures for each proposed community of license:

Applicant	*Proposed Community of License*	*1980 Population*
Orange County	Orange	91,788
Par	Oceanside	76,698

SBC[17]	Santee	47,080
New Radio	La Mirada	40,986
Western	San Marcos	17,499
Alessandro	San Jacinto	7,098

There are currently no broadcast stations licensed to serve Orange, Santee, La Mirada, San Marcos or San Jacinto. According to Commission records, two stations, KUDE and KEZL(FM), are licensed to serve Oceanside (Orange County Ex. 8, pp. 1-3; Tr. 204).

54. The areas and population proposed to be served by the applicants within their proposed 0.5 mV/m primary service contour during daytime hours are:

Applicant	*Area (Sq. Mi.)*	*Population*
New Radio	24,303	10,027,844
Alessandro	21,824	9,278,436
Orange County	8,933	9,205,280
Par	8,554	3,102,171
Western	5,659	1,638,893

The entire area served by the Orange County, Par and Western daytime proposals currently receives service from five or more existing broadcast stations (Alessandro Ex. 10, pp. 7-8). Alessandro's daytime proposal would provide a third service to an area of 20 square miles with a population of 101, a fourth service to an area of 44 square miles with a population of 322, and a fifth service to an area of 164 square miles with a population of 394. The New Radio daytime proposal would provide a fourth service to an area of 120 square miles with a population of 354 and a fifth service to an area of 329 square miles with a population of 3,234.

55. The areas and populations proposed to be served by the applicants within their proposed nighttime interference-free contours are:

Applicant	*Area (Sq. Mi.)*	*Population*
Orange County	1,163	5,671,255
New Radio	877	5,077,578
Western	765	948,433
Par	674	719,609
Alessandro	1,535	417,041

(Joint Engineering Exhibit)

[17] SBC made no showing under the 307(b) issue. Thus, except for the population of Santee, there is nothing in the record which permits a comparison of the SBC proposal with the proposals of the other applicants herein. SBC attempted to introduce comparative coverage evidence, which evidence was rejected (Tr. 382).

The entire area served by these proposed nighttime interference-free contours currently receives service from five or more existing broadcast stations (Alessandro Ex. 10, pp. 7-8).

The Comparative Issues

Alessandro:

56. Daniel Sedillos would be the General Manager of the station proposed by Alessandro and intends to devote his full-time attention to the construction and operation of the station. He is of Hispanic heritage (Alessandro Ex. 1, p. 2). He recently moved to Hemet, and he also lived in San Jacinto for a year, about twelve years ago (Tr. 218). He has lived in the Hemet-San Jacinto-Riverside area for the past twenty years. Daniel Sedillos and Consuelo Sedillos owned and operated a restaurant in Hemet from 1966 to 1969, and then moved the business to San Jacinto, where they operated it until August 1983 (Alessandro Ex. 1, p. 1). San Jacinto and Hemet are adjacent communities (Tr. 218-219). Sedillos has sponsored youth sports programs in the area and has sponsored activities at St. Hyacinth's Catholic School for the past ten years. He has also belonged to the Rotary, American Field Service and Elks Club (Alessandro Ex. 1, p. 2).

57. Consuelo Sedillos is the proposed Public Service Director of the station. She is of Hispanic heritage (Alessandro Ex. 2, p. 2). She has agreed to serve in a full-time capacity at the station. Mrs. Sedillos had little idea of what her duties would be at the station, but said she would learn (Tr. 246-247). She has never worked at or had any connection with a broadcast station (Tr. 246). She has lived in the Hemet area for 20 years and currently resides in Hemet (Alessandro Ex. 1, p. 1). She lived in San Jacinto for one year about 10 or 12 years ago (Tr. 245). She has sponsored activities at St. Hyacinth's Catholic School for the past ten years and is a member of the Rotary, American Field Service and Dolphins Swim Clubs and the PTA (Alessandro Ex. 2, p. 1).

58. Gilbert Hurtado is the proposed Secretary, Chief Financial Officer and Program Director of the station. He is of Hispanic heritage (Alessandro Ex. 4, p. 2). Hurtado has not worked at or had any connection with a broadcast station (Tr. 254). He had no clear idea of what his duties at the station would entail, or how his time would be spent at the station (Tr. 254, 256-257). However, Hurtado asserted that he will spend a minimum of 40 hours per week at the station (Tr. 257). He testified that he has no idea how much time each of his three positions at the station will require (Tr. 257-259). As Secretary of the corporation, Hurtado currently keeps the books and records of the corporation and writes the minutes of its meetings. As Chief Financial Officer, he is in charge of the finances (Tr. 271). He lives in Hemet and has lived in the Hemet-San Jacinto area

for the past twenty years. Hurtado is a member of the Kiwanis, the Chamber of Commerce, and the YMCA (Alessandro Ex. 4, pp. 1-2).

59. Michael L. Rhodes is the proposed Sales Manager of the station and intends to work at the station at least 40 hours per week. He has never been employed at a radio station (Alessandro Ex. 5, p. 3; Tr. 276). He has lived in Hemet, California for the past six years. While he has never lived in San Jacinto, he owns a business there (Tr. 275). Rhodes is a member of the Simi Valley Jaycees, the Hemet Valley Kiwanis, and the Chamber of Commerce (Tr. 278).

60. Jude Thaddeus A. Powers is a partner in a law firm in Hemet and currently spends about 60 hours per week in the practice of law (Alessandro Ex. 6, p. 2; Tr. 285-286, 287-288). He intends to spend 20 hours per week in the construction and operation of the station and to participate as an attorney in the operations and business of the station (Alessandro Ex. 6, p. 3). He said that his work as an attorney for the station would be in addition to the 20 hours per week spent in the construction and operation of the station (Tr. 284). However, at his deposition, conducted on May 17, 1983, Powers stated that he only intended to perform legal services for the station, probably through his law firm (Tr. 289-291). Powers did not think he would have an office at the studio (Tr. 285). Daniel Sedillos also stated that he did not think Powers would have an office at the station and when asked whether Powers would perform any other functions besides those of the station's attorney, e.g., reviewing sales contracts, Sedillos stated, "No, I have not expected him to do anything else besides that" (Tr. 231-232).

61. Powers has lived in Hemet, California, since 1971 and has lived in the Hemet-Riverside area for the past 24 years (Alessandro Ex. 6, p. 1; Tr. 281-282). Powers was President of his church's council seven or eight years ago, was on the Board of the Ramona United Way three or four years ago, was Second President of the Hemet Valley Kiwanis Club six or seven years ago, was an officer in the Knights of Columbus nine years ago, and was President of the Hemet-San Jacinto, California, Republicans Assembly eight or nine years ago. Powers is currently President of the Hemet Valley Dolphins Swim Club and a member of the Hemet Search and Rescue Team (Alessandro Ex. 6, p. 2; Tr. 292-294).

62. None of the Alessandro stockholders has any other broadcast interests (Alessandro Exs. 1, p. 2; 2, p. 2; 3, p. 2; 4, p. 2; 5, p. 3; 6, p. 3). However, James Richards, who will receive 15 percent of Alessandro's stock, if the Alessandro application is granted, is the General Manager and 22 percent stockholder of KLAX-TV, Alexandria, Louisiana, and a director and Vice President of Winfield Live Broadcasting, the licensee of WXOK, Baton Rouge, Louisiana (Alessandro Ex. 11; Orange County Ex. 24, pp. 4-5, 7).

63. James Richards serves as a broadcast consultant for Alessandro. If the Alessandro application is granted, he will assist the Alessandro principals in constructing and operating the station, but will not have a position at the station (Tr. 219). Daniel Sedillos has known Richards for some time and stated that whenever Richards visits the area, which is frequently, he always visits Sedillos (Tr. 229). Richards first contacted Sedillos about the radio project two or three years ago, and asked Sedillos if he could put together a group of people to apply for the frequency (Tr. 229). Richards was primarily responsible for the formation of the corporation and the preparation and filing of the Alessandro application (Tr. 239, 248-249, 279-280; Orange County Ex. 18, pp. 14-20). The Alessandro principals, in fact, have no precise idea of what their job functions will be, other than to do whatever Richards tells them to do (Tr. 219-220, 226-268, 284).

New Radio:

64. New Radio was incorporated on January 21, 1981, under the laws of the State of California. The officers of New Radio are: President Clarence S. "Stan" Duke; Vice President and Secretary, Lincoln C. Hilburn; Treasurer, Florence A. Cantrell-May. The Board of Directors of New Radio is composed of:

Clarence S. Duke

Lincoln C. Hilburn

Florence A. Cantrell-May

James Roosevelt

James Roosevelt is a director and five percent shareholder of New Radio. Mr. Roosevelt will not be integrated into management, and he has no other broadcast ownership interests. The shareholders of New Radio are:

Clarence S. Duke	7,000 shares
Lincoln C. Hilburn	1,000 shares
Florence A. Cantrell-May	1,000 shares
James Roosevelt	500 shares
Benjamin F. Dawson, III	500 shares

Benjamin F. Dawson, III, is a five percent shareholder of New Radio. He will not be integrated into management on any basis. Mr. Dawson has no other broadcast ownership interests. Mr. Dawson is a director of the Jack Straw Memorial Foundation, licensee of noncommercial educational FM Station KRAB, Seattle, Washington, and which previously was the licensee of Station KBOO (FM), Portland, Oregon (New Radio Ex. 4, pp. 4-5). New Radio and its principals hold no other broadcast ownership interests.

65. *Clarence S. "Stan" Duke* — Mr. Duke is a black American who has resided continuously in the Los Angeles/Southern California area since 1966 (New Radio Ex. 1, p. 2). He currently resides in Santa Barbara, California (*Id.*). He is proposed to be the full-time Program Director of the station, with responsibility for the development of all program content on the station (New Radio Ex. 1, p. 3). If the New Radio application is successful, Mr. Duke will terminate his present employment positions, move to the La Mirada area, and commit himself full time to the station (New Radio Ex. 1, p. 4).

66. Mr. Duke received his First Class Radiotelephone Operator's license in 1957 and has since worked in the positions at the stations indicated below:

Station	*City*	*Position*	*Approximate Date*
KBMX Radio	Coalinga, CA	Staff Announcer	1956-1957
KEED Radio	Springfield/Eugene, OR	Sports Ann/Eng	1958
KGON Radio	Portland, OR	Sports Ann/Eng	1959-1962
KWJJ	Portland, OR	Sportscaster	1963-1965
KGW-TV	Portland, OR	Engineer	1964-1965
KPTV	Portland, OR	Announcer	1962
KGW Radio	Portland, OR	Sportscaster	1964-1965
KOIN Radio	Portland, OR	Sportscaster	1965-1966
KNBC-TV	Burbank, CA	Engineer	1965-1966
KNXT-TV	Hollywood, CA	Sportscaster	1966-1971
KIST Radio	Santa Barbara, CA	Sports Director	1975-1976

(New Radio Ex. 1, p. 3.)

Duke has also taught various classes in radio and television production, public relations and speech at Lewis and Clark College, Los Angeles City College and Oxnard College (New Radio Ex. 1, p. 2). He holds a lifetime teaching credential from the California Community College (*Id.*). He has been employed as a commentator for sporting events and other presentations by a production company in Santa Barbara, and he has held other broadcast-related positions, some of which include:

> Sports Information Director — University of California at Santa Barbara (1974 - 1978);
>
> Research of broadcast properties — Cal-Am Corporation, Los Angeles, CA (1977).

67. *Lincoln C. Hilburn* — Mr. Hilburn is a black American who has resided in the Southern California area since 1943 (New Radio Ex. 2, p. 2). He currently resides in Culver City, California, an approximately 30-minute drive from La Mirada (*Id.*). He is proposed to be full-time General

Manager of the station, providing day-to-day, detailed supervision of the station's operation and all of its employees (New Radio Ex. 2, p. 5).

68. Mr. Hilburn received his First Class Radiotelephone Operator's license in 1948 and has since obtained substantial experience in many areas of the broadcast industry; his broadcast employment experience includes the following:

> Announcer and/or announcer/engineer at a number of broadcast stations, including Station KBLF, Red Bluff, California (1948); KREO, Indio, California (1949); KGFJ, Hollywood, California (1949 - 1951); KROP, Brawley, California (1951); KFQD, Anchorage, Alaska (1953); KSON, San Diego, California (1954); KPOL, Los Angeles, California (1966); KHJ-TV, Los Angeles, California (1969); KLAC, Los Angeles, California (1969 - 1970); and KABC(AM), Los Angeles, California.

Hilburn's responsibilities in these positions included engineering; announcing of music, news and sports; editing; interviewing; commentating; and/or hosting discussion and call-in programs. In connection with his work at Station KPOL, he received a Golden Mike Award for news commentary, and in connection with his work at Station KLAC, he received a Greater Los Angeles Press Club Journalism Award for newswriting on a local subject.

69. From 1971 - 1976, Hilburn served as Director of Minority Affairs for Golden West Broadcasting, the Los Angeles-based licensee of Stations KTLA-TV, Los Angeles; KMPC(AM), Los Angeles; KSFO(AM), San Francisco; KEX(AM), Portland, Oregon; and KVI(AM), Seattle, Washington. In that position, he helped to establish training programs for minorities throughout thirteen western states. In addition, Hilburn recruited talent and created, produced and hosted television shows.

70. Hilburn served as Producer of a special entertainment program, entitled "Moving and Grooving," which was broadcast by Station KNBC-TV, Los Angeles, in 1973. He served as Assistant Producer of a second program, entitled "Carnival Island," which was broadcast on that station in 1974. He served as Executive Producer of a five-hour special entertainment program entitled "Beautiful and Now," broadcast by Station KTLA-TV, Los Angeles, in the early 1970s. He has also served as a writer and announcer of broadcast documentaries and as co-creator of a television series.

71. Hilburn has worked on a parttime or occasional basis at a substantial number of other broadcast stations. His jobs at such stations have included announcing, producing, writing, sound technician, grip, and general worker.

72. In addition to his professional, broadcast-related involvements, Mr. Hilburn has been active in a number of civic interests, including:

> Special Resources Supervision to Teen Post, a teenage oriented service with approximately 26,000 members in Los Angeles county, 1964-1966.

In that position, Hilburn trained teenagers in news reporting and assisted in the writing of proposals to expand the program.

> Founder and/or organizer of a number of civic groups and programs, including the South Central [Los Angeles] Junior Chamber of Commerce; the Christmas Tree on Central Avenue (an annual program in which more than 25,000 gifts are supplied to impoverished youths in the Los Angeles area); Watts Training Program (Radio and TV) program sponsored by the Electronic Media Community in Southern California and other organizations, 1970 - 1971. Establishment of "Sales Training Programs" at the University of Southern California and San Francisco State University, 1971. He has taught announcing and other broadcast related matters at Martin School of Radio and Television Arts and Sciences, Hollywood, California, 1965 - 1967. Hilburn has also taught a media class for the Watts Training Program (Radio and TV) described previously, 1970 - 1971.
>
> Co-Chairman, Labor and Industry Section, Beverly Hills-Hollywood National Association for the Advancement of Colored People, 1976 - 1978.
>
> Member, Equal Employment Opportunity Commission Committee, American Federation of Radio and Television Artists, 1972 - 1976.

Mr. Hilburn intends to continue his civic work except to the extent necessary to assure his ability to meet his commitment to the station.

73. *Florence A. Cantrell-May* — Mrs. Cantrell-May is a black female American who resides in Oakland, California (New Radio Ex. 3, pp. 1-2). She is proposed to be full time Treasurer and Fiscal Officer of New Radio, with responsibilities which will include establishment of fiscal policies and procedures for the station and the day-to-day implementation and management of those policies and procedures (New Radio Ex. 3, p. 5). She will also be responsible for the administration and implementation of the station's Equal Employment Opportunity program, and she expects to be involved in the development of public affairs programming for the station (*Id.*). If the New Radio application is successful, she will retire from her full-time employment with San Francisco Unified School District and move with her husband to the La Mirada area.

74. Mrs. Cantrell-May has appeared on discussion panels on multicultural education and cross-cultural communications which have been broadcast, and she has written a series (six one-half hour segments) dealing with the achievements, growth and development of women (particularly black and minority women) in the United States. That series was broadcast by Radio Station KALW, San Francisco (New Radio Ex. 3, p. 5).

75. Since 1959, Mrs. Cantrell-May has been employed by the San Francisco Unified School District. She is certified by the state of California and her extensive teaching experience with the district includes:

> Staff Development Specialist, Multicultural Education (1973 to present);
>
> Supervisor, Multicultural Education; Reduction of Racial Tension (staff of 15) (1976 to present);

Specialist, Black and Ethnic Studies, Multicultural Education (1968 to 1973);

Worked with educationally and neurologically handicapped students (1959 to 1968).

Mrs. Cantrell-May has also been involved in a number of development programs and training workshops relating to education and communication. Her civic and professional activities have included serving as a member of an advisory panel for S.T.R.I.D.E. (Service, Training, Research in Desegregated Education), General Assistance Center, Far West Lab, San Francisco, and as a member of an advisory committee on multicultural education of the Bureau of Intergroup Relations, California State Department of Education. Mrs. Cantrell-May has also served as a consultant to an extensive number of school districts, colleges, universities, state agencies and publishers (New Radio Ex. 3).

Western:

76. Jeffrey Chandler is the proposed General Manager of the station which would be established by Western at San Marcos. He currently lives in Oceanside, California, a community adjacent to San Marcos, and if the Western application is granted, he will move to San Marcos and undertake full-time (at least 40 hours per week) employment at the station. As General Manager, he will supervise all aspects of station operations, with a concentration in sales and sales administration (Western Ex. 2).

77. Chandler was born in Los Angeles and attended several different colleges in the Los Angeles area between 1960 and 1966. He has resided in Oceanside since 1978 and from 1976 to 1978, lived in Vista, California, another community which borders San Marcos. Chandler was a director of the Carlsbad Chamber of Commerce from 1977 to 1981 and during 1980 - 1981, was also its Vice President and President-elect. From 1976 to 1978, he was also Vice President of the Kiwanis Club serving North San Diego County. Chandler has been active in fund raising for the YMCA and the Boys and Girls Clubs of Carlsbad and, through KKOS, has sponsored youth sports teams in the Carlsbad area and helped organize charitable fund-raising efforts (Western Ex. 2).

78. Chandler is the President and 98.5 percent owner of Tri-Cities Broadcasting, Inc., the licensee of FM broadcast station KKOS in Carlsbad. Carlsbad and San Marcos are adjacent communities. Chandler served as General Manager of KKOS from 1974 to 1977 and from 1980 to 1981. He currently oversees station operations in his position as President of Tri-Cities and stated that he would probably continue to do so if the Western application is granted (Western Ex. 2; Tr. 560-562).

Par:

79. Par claims no integration credit for the participation of any of its principals in station management. Leon Parma, the Managing Partner, is of Hispanic heritage (Par Ex. 1 (Supplement); Tr. 186).

80. Par is the licensee of standard broadcast station KUDE and FM broadcast station KEZL in Oceanside, and its application here is for a change in the facilities of KUDE. Neither Par nor any of its principals have any other interests in any medium of mass communications (Par Ex. 2).

Orange County:

81. At the "B" cut-off date in this proceeding, six individuals owned shares of stock in Orange County, in the following percentages:

Ernesto S. Cervera	22.99 percent
David J. Hubbard	22.99 percent
J. Fernando Niebla	17.24 percent
Manuel E. Sepulveda	10.35 percent
Joseph C. Somoza	22.99 percent
Robert A. Savedra	3.45 percent

(Orange County Ex. 1, p. 1.) (Arithmetically this would appear to be a total of 100.01 percent.)

82. Ernesto Cervera is the sole owner of Cervera International, an advertising agency. At Cervera International, Mr. Cervera has been responsible for, and has supervised, the production of radio and television commercials and the purchase of time for commercial matter on radio stations (Orange County Ex. 6, pp. 1-2).

83. Ernesto Cervera is proposed as the parttime (20 hours per week) Production Manager at the station in Orange (Orange County Ex. 6, p. 1). He has resided within the proposed service area for approximately fifteen years. (*Id.*). He is of Hispanic heritage (*Id.*). He has approximately ten years of broadcast experience as a program manager (*Id.*, p. 2). He has been involved in several civic activities in the Los Angeles area (*Id.*).

84. David Hubbard is proposed as the full time General Sales Manager (Orange County Ex. 4, p. 1). He has lived within the proposed service area for approximately five years and will move to Orange in the event of a grant (*Id.*).

85. Fernando Niebla is proposed as the station's parttime Business Manager (Orange County Ex. 7, p. 1). He has lived in the proposed service area for approximately fifteen years (*Id.*). He is of Hispanic heritage (*Id.*).

He has been involved in one civic activity in Orange County since 1981 (*Id.*).

86. Manuel Sepulveda is proposed as the station's full time General Manager (Orange County Ex. 3, p. 1). He has lived within the proposed service area for approximately five years and will move to Orange in the event of a grant (*Id.*). He is of Hispanic heritage (*Id.*). He has been involved in several civic activities within the proposed service area (*Id.*), p. 2.

87. Joseph Somoza is proposed as the station's full time[18] local Sales Manager (Orange County Ex. 5, p. 1; Tr. 613-615). He has resided within the station's proposed service area for approximately thirty years and will move to Orange in the event of a grant (Orange County Ex. 5, p. 1). He is of Hispanic heritage (*Id.*). He has been involved in several civic activities within the proposed service area (*Id.*, pp. 1-2).

SBC:

88. Seven of SBC's nine principals signed documents by which those who held offices or directorships resigned those positions, and all seven assigned their respective stock interests to Joseph D. Jones, the President and 25 percent stock subscriber. Jones petitioned to amend the SBC application to reflect those withdrawals. At the hearing, SBC sought to withdraw the amendment and to have it regarded that the seven withdrawing persons had returned to the applicant group. His theory was that since the instruments they had signed were also supposed to be signed by him, and since he did not sign them, the withdrawals were not effective.

89. The nine individuals, who are asserted to have returned to SBC, have subscribed to stock in the following percentages:

James W. Beatty	10 percent
Bernard Landman	10 percent
Patricia Welch	7 percent
Thomas W. Mathis	15 percent
Julie Cohen	7 percent
Joseph D. Jones	25 percent
Patrick E. Chavis, III	10 percent

[18] A stipulation was made at the hearing that Mr. Somoza's proposal would be for parttime service at a minimum of 20 hours and at a maximum of 40 hours a week (Tr. 614). However, Orange County (in its proposed findings (at p. 78), citing *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982)) urges, even though not in the original application, and as a fair reading of that precedent would suggest, Somoza's proposed integration be credited full time, which will now be accepted and credited under that precedent.

Paul Major	15 percent
Michael G. Lacy	1 percent

(SBC Ex. 5.)

90. Joseph D. Jones is the proposed full time General Manager of the station which would be constructed by SBC at Santee, and his duties would include overseeing department heads and directing the station with regard to policy (SBC Ex. 7, p. 1). Jones is a black male (SBC Ex. 8). He lives in Hacienda Heights, California, a community located approximately 100 miles north of Santee (Tr. 635-636) and is the President of Interstate Media Corporation, which is engaged in broadcast and cable consulting services (SBC Ex. 8, p. 2). Jones did not represent that he would move his residence if the SBC application is granted.

91. Jones was employed by radio station KNX, Los Angeles, as an Account Executive Trainee and Research Director from February 1970 to May 1971. From May 1971 to June 1977, he was employed with CBS in New York as an Account Representative, where he was the recipient of awards and bonuses for excellence in professional performance. From July 1977 to January 1979, Jones was the Vice President/Broadcast Division of Combined Communications Corporation in San Diego. In that position, he had responsibility for reorganizing two radio stations, was in charge of budget projection for newly acquired stations, analyzed operational methods and procedures and made recommendations, and initiated market research projects. From October 1979 to July 1981, Jones was the Minority Affairs Director of RKO Radio in Los Angeles, where he was responsible for developing a nationwide intern and recruiting program for the RKO Radio division. From January 1979 to October 1979, and from July 1981 to present, Jones has done broadcast consulting work through Interstate Media Corporation (SBC Ex. 8).

92. Jones is the President, a Director and 95 percent shareholder of Interstate Media Corporation (IMC). IMC is the proposed assignee of WHCT-TV in Hartford, Connecticut. By *Memorandum Opinion and Order*, released January 3, 1984, the Commission, by the Chief, Mass Media Bureau, granted the assignment application and ordered that the transaction be consummated within 90 days (official notice taken). Jones testified that the proposed purchase price for the television station is $3.1 million (Tr. 647-649). The Hartford station is currently in operation, and Jones intends to make significant changes in the operation, including building new facilities and completely changing the programming and staff. Jones said he would participate in the management of the Hartford station, but could not say to what degree. He has already approached an individual about becoming the general manager and stated that he would

be willing to delegate quite a bit of responsibility to that individual (Tr. 652-656).

93. Two of the other SBC principals have other broadcast interests. Thomas Mathis is the licensee of station KTLE-AM at Tooele, Utah, and stations KBRV and KFIS-FM at Soda Springs, Idaho. Paul Major is the majority stockholder of the licensee of station WTMP at Tampa, Florida (SBC Ex. 7, p. 2).

Ultimate Findings and Conclusions

Alessandro:

94. The Waiver Request Issue applying to Alessandro — Rule 73.21(a)(2)(ii)(C) — will be addressed and disposed of at the outset. Alessandro proposes to operate with nighttime power of 5 kW. That Rule establishes a 1 kW nighttime power ceiling for Class II-B stations on 1-A clear channels in already well-served areas such as San Jacinto, California. Alessandro's request rests under the burden of the *Designation Order*, here, at para. 13:

> "The applicant has a heavy burden to show that the power it proposes is necessary to provide principal city service and will not impede the Commission's allocation objectives; it may meet the latter by showing either that the higher power would not preclude other possible co-channel unlimited-time Class II assignments or that the improved principal city service entailed by the higher power clearly outweighs any potential service that might be precluded."

95. In its view, the Bureau in proposed conclusions, citing *Dena Pictures, Inc. and Alexander Broadcasting Co., a joint venture d/b/a Kay-Smith Enterprises*, 48 Fed. Reg. 4725, published February 2, 1983, and *dicta* in *WAIT Radio* v. *FCC*, 418 F. 2d 1153, 16 RR 2d 2107 (D. C. Cir. 1969) urging that these cases demonstrate "the strong nature of the showing required to justify waiver." Also, that Alessandro has not shown that its proposed higher power is "*necessary*" to provide principal city coverage; that that type coverage — 25 mV/m over the business and commercial areas of San Jacinto — can be obtained with the lower power limit in the rule; "indeed," the Bureau states, with such reduced power, the 25 mV/m contour would cover about 80 percent of the city, with the most distant areas receiving a signal of 21.6 mV/m or better. With additional minor changes, 25 mV/m coverage of the entire community could be achieved by complying with Rule 73.21. On this issue, Alessandro fails to demonstrate waiver is *necessary* to provide principal city coverage.

96. Further, under the test whether a waiver may be justified by showing that the Commission's allocation objectives will not be impeded, Alessandro again fails in that its preclusion study itself establishes a potential preclusive effect on future assignments and the proposed additional service would not outweigh such preclusion even were one to

provide service to double the population. The latter — additional service to "additional persons," adds the Bureau, "would be nonsensical." Finally, as here, when service to the principal community would be more than adequate under the power limitation of the rules, the benefits of additional service to other areas are minimized, the Bureau concludes. In its reply, at most, Alessandro concedes "*de minimis*" preclusion of potential service saying that it "has the greatest amount of coverage area and population of any of the applicants" save New Radio. Nevertheless, the "high hurdle" required of Alessandro has not been cleared, waiver, therefore, cannot be granted and thus Alessandro must be held as not technically qualified to be a Commission licensee, AND IT IS SO CONCLUDED.

97. Despite its disqualification and because this disposition is rarely the final one, Alessandro, nevertheless, will be considered under the standard comparative issues.

New Radio - Clarence S. Duke:

98. Addressed now is the evidence of record respecting the person of Clarence S. Duke, the principal stockholder of the applicant, and the effect of that evidence on the notion whether he is fit to be a broadcast licensee of this agency. Sections 308 and 309, Communications Act of 1934, as amended, are the principal sources of authority on which are bottomed the policy and precedent involving "character" attributes of prospective licensees. A prominent precedent setting forth what must be expected of broadcast applicants is, of course, *Office of Communication of the United Church of Christ* v. *FCC*, 425 F. 2d 543 (U.S. App. D.C. (1969)). There among others, it was observed:

> " . . . broadcasters are temporary permittees — fiduciaries — of a great public resource and they must meet the highest standards which are embraced in the public interest concept."
>
> (At p. 548.)

99. One of the parties here in its proposals notes, "In all its history . . . the Commission has not, until now, been faced with an applicant who has committed murder. Murder — the deliberate taking of a human life — is among the most heinous crimes known to man. In this case, Clarence S. Duke, the President and 70 percent stockholder of New Radio, was convicted of second degree murder in 1971. The crime involved killing, with a shotgun, a man whom Duke found in his then-wife's bedroom. Duke was sentenced to prison for the crime. After serving three years in California correctional facilities, he was paroled" (Orange County's Proposed Conclusions, p. 54).

100. New Radio, in noting that Commission inquiry into an applicant's past misconduct "is clearly permissible" would have it that the forms of such inquiry "must be the 'predictive' value of the past misconduct in

question. That is, such inquiry must be limited to the question to what extent, if at all, the misconduct reflects the applicant's likely future broadcast experience," citing *Policy Statement on Violations by An Applicant of Laws of the U.S. Other Than the Communications Act of 1934, as Amended*, 42 FCC 2d 399 (1951) and *Central Texas Broadcasting Co., Ltd.*, 51 RR 2d 1478 1485 (Rev. Bd. 1982) (New Radio's Proposed Conclusions, p. 63). Continuing its thesis, New Radio insists that the Commission must assess the misconduct here not in the broad context of "good" and "bad" but in a far more narrow context of what the misconduct may say about the applicant's prospective ability to operate a broadcast station. Mr. Duke's crime "was a once-in-a-lifetime tragedy unlikely to recur." That Duke's actions were not "the result of malice, dishonesty, disregard for lawful authority or even bad judgment — rather, they were the result of blinding, jealous, personal rage, an emotion not likely to be encountered in the day-to-day operation of a broadcast station" (*Id.*, p. 64).

101. Emphasizing that the particulars of Duke's crime are "not" in issue here, one must recognize the actual motive of Duke's conduct. "He did *not* commit premeditated, first degree murder. . . . Instead, Mr. Duke's crime was one of passion . . . 'of absolute anger, a flash' when Mr. Duke discovered his then-wife in a sexual liaison with another man," that his conduct in summoning police, surrendering and confession is precisely the type of response which the Commission as a regulatory body, depending on voluntary compliance of its regulations, should and must expect of its licensees, citing *Janus Broadcasting Company*, 78 FCC 2d 788 (1980).

102. Because broadcasters are considered "public trustees" and have been set apart and held to higher standards of conduct than have licensed operators in private enterprise (*Notice of Inquiry* in General Docket No. 81-500, FCC 81-387, released August 6, 1981) these longstanding principles, argues Western, have meant that the Commission has given appropriate weight in its comparative broadcast hearing process to criminal convictions of applicants' principals. Citing *Chapman Radio and Television Co.*, 47 FCC 2d 775 (Rev. Bd. 1974) vacated and remanded on other grounds, 57 FCC 2d 76 (1975) *recon. den.*; 36 RR 2d 1189 (1976), Western adds, a principal of an applicant was found to be unqualified to hold a broadcast license because of his conviction on several counts of conspiracy to obstruct, delay and affect commerce by extortion and under color of official right, a crime for which that principal was sentenced to term in prison. That the criminal conduct, there, occurred during 1962 - 1966, approximately ten years before the Commission reached its decision, and that in *Chapman* the applicant itself avoided disqualification only by,

"*inter alia*," taking positive steps to remove the principal upon learning of his conviction.

103. Under that precedent, New Radio must be disqualified, says Western; murder is at least as grave an offense as extortion which warranted disqualification in *Chapman* and that "[u]nlike the applicant in *Chapman*, however, New Radio has taken no steps to remove Duke as principal," who has been the majority stockholder involved in the application process from its filing date. Western also notes that the disqualified principal in *Chapman* was employed in the banking business, while Duke committed murder during a period when he was an announcer at station KNXT-TV, Hollywood, California.[19]

104. Were those urgings not enough to disqualify Duke it is also argued that, if consideration is to be given to the conduct of Duke *since his conviction and incarceration*, he "still falls short of being qualified." As to his being "rehabilitated," little more than "a general and non-specific litany" of his employment listing since 1974 has been presented plus supporting declarations of four acquaintances indicating nothing but "ordinary and prudent" conduct. Rather, it is submitted by Orange County, "a woman who is the mother of his child, stated, in a suit for paternity and support, that Duke has shown no remorse for his crime and has threatened to kill her and the Judge who presided at his sentencing." Duke denied these allegations. In any event, Orange County would have it that Duke's post-parole conduct cannot be deemed to demonstrate "rehabilitation which serves to qualify him for a broadcast trusteeship."

105. What does the evidence on this otherwise grave issue affecting the applicant New Radio compel? Without doubt, as submitted by Duke's opponents, murder under any civilized standard is heinous, if not the most heinous, of all crimes against society. Presumably, the Court was sufficiently convinced that Duke's conduct under California law was murder and not some lesser offense possibly permitted under its law of crimes. New Radio would have it that, prompted by the confrontation of the particular circumstances attending, Duke became "enraged," and that his crime was but a "once in a lifetime" occurrence. (One might fervently hope so.)

106. His conduct, post parole, attested to by persons of both broad public reputation and general community reputation of admirable degree suggests a Duke far different than at the time of his crime. The disparaging references to his post-parole behavior repose in a verification or affidavit accompanying a lawsuit in paternity and child support. Duke has categorically denied the accuracy or truth of these allegations, save to

[19] Western relates, in its Proposed Findings at p. 28, the "Duke was certainly aware at the time he committed his crime that broadcasters have a fiduciary duty to the public and that they are held to the highest standards of conduct."

the extent of acknowledging acquaintance with a former prison inmate whose reputation appears less than sterling but who now works for "the good guys." In any event and, on balance, that disparagement in the face of Duke's denial would fade in evidential significance, the affiant not appearing in this proceeding to bear the test of his or her allegations in the customary method at trial.

107. There is also the matter of some relevance to the issue of Duke's "character" and that is that the evidence of record fails to disclose any attempt or effort on the part of Duke to conceal or disclose his crime and conviction. Indeed, it would appear that the *Designation Order* here found all "nine applicants . . . qualified to construct and operate as proposed" including, of course, New Radio whose principal is Clarence S. Duke. Presumably, the authorities concerned with the customary processing of applications were not unaware of Duke's public record. They surely did not see fit to address and set forth in the proposed *Designation Order* that record or how it might affect the *basic* qualifications of New Radio. The forum added the Duke "character" issue, premised on an in-depth and detailed articulation (by an opponent here) of Duke's public record as a threshold allegation which when fully tested might affect the overall qualifications of applicant, New Radio; and the evidence under that added allegation is that which is being addressed at this point.

108. What does the evidence reflect as to the demeanor of the person/witness Duke? On occasion, especially during cross examination, he reacted testily and flippantly to cross examining counsel, responding on at least one instance that the Statute cited in his pleadings spoke for itself, adding "end of conversation" when counsel sought the definition or meaning of that Criminal Statute under which Duke has been convicted. Duke simply did not wish to state or have the record reflect the obvious, that he had been involved most directly in a murder. Perhaps such reaction may, under the given conditions, be a natural, human one. Hence, Duke's demeanor was less than perfect; yet it, standing alone, would not be wholly disabling or derogatory of the proceeding or himself as to the particular notion of his *basic* qualification to be a full contestant in this proceeding. What other effect his overall demeanor may suggest will be addressed later.

109. No eyes can be shut nor attention distracted with the object of shunning the gravity, whatever the supposed state of this society, of the crime of murder; be it the proffered New Radio plaint simply triggered by the occasion producing an "enraged" act or that measured and determined by the Trial Court. Does the taint of that act remain a "damned spot" for the remainder of one's public life? One's private life is simply that, private; albeit if the notion of remorse needs objective manifestation to measure, e.g., as an element inferring "rehabilitation" that need not be

reached simply because no clearly convincing evidence appears in this respect; even implicitly, the matters attending Duke's paternity and child support suit or his acquaintance with a reported habitual criminal, notwithstanding. This, even in the face of the fact that Duke's crime and its date can hardly be viewed as either stale or of ancient memory. Were one dealing with the ramifications of rational conjecture, that may be an interesting intellectual journey — but in these matters, conjecture would be an illegal alien in the province of a fair and just resolution of the basic issues. Under those issues in this our system, the abiding constraint reposing in the maxim, *jus dicere et non jus dare* (he who decides must declare the law, not make it) must be honored.

110. Hence, the *residuum* of all the evidence of record, that officially noticed in exhibits and testimonial, would not compel the inchoate disqualification of the applicant New Radio premised on the record conduct of its principal, Clarence S. Duke. Whether, in the ultimate, comparative detriment may or should attach to New Radio as an applicant will be considered hereinafter, as earlier noted.

New Radio - Real Party in Interest Issue:

111. Under this issue, principal concern is whether the evidence sufficiently demonstrates that a third party, not an integral party or participant in the applicant New Radio is the real party in interest. The template in the measurement of that determination is described in a leading precedent, *KOWL, Inc.*, 49 FCC 2d 962 (Rev. Bd. 1974) where it is stated:

> ". . . whether that person has an ownership interest, or is or will be in a position to actually or *potentially control* the operation of the station. [Citations omitted.] And, while supplying the major source of financing does not necessarily cause a third party to become a real party in interest [citation omitted], '[i]t is well known that one of the most powerful and effective methods of control of any business, organization or institution and one of the most *potent* causes of involuntary assignment of its interests, is *control* of finances.' *Heitmeyer* v. *FCC*, 68 U.S. App. D.C. 180, 188; 95 F. 2d 91, 99 (1937)." (Emphasis added.)

112. Here, in order to construct and operate its proposed station for three months, New Radio will rely solely on a loan of $2,000,000 to be provided by California businessman, Sam Gilbert; Gilbert will charge New Radio interest on the loan at the rate of "three percent above prime" but will require no collateral of New Radio or its principals. Orange County, addressing the conditions here, observes:

> "While there is no reason to question the beneficence and generosity of Gilbert in making his financial resources available to Duke, the Commission cannot be asked to go so far as to believe that, as the sole financier of the station, to the tune of $2,000,000, and having no other security, Gilbert will not exercise sufficient control over the station and its operations to protect his advance. The fund is not intended as

> a gift. It is to be a loan and, as such, it is to be repaid or is to be secured by the only asset available, the station.
>
> * * * * *
>
> Here, there is little doubt who will pick up the pieces should New Radio fail to make the enormous payments which will fall due under the loan, $280,000 in the first year and $780,000 in the second year" (Orange County's Proposed Conclusions, p. 58).

113. The witness Gilbert and his demeanor also warrant close appraisal and to cast better light through his testimony on the full range of this issue. Gilbert, who is 70 years old, first of all represents himself as a highly successful office building constructor who estimates his net worth at "$30,000,000" and volunteered his ability to borrow large sums of money on the basis of "his signature alone." Indeed, he stated he had recently obtained a loan of $56,500,000 "only on my signature" (Tr. 323); later he changed that remark to add also the signature of "my son" was needed (Tr. 348). Sam Gilbert and Associates is a "Partnership Incorporated" and Gilbert and his son each own 50 percent of its stock. His loan commitment letter to Duke and New Radio "contained all the terms of his agreement," "wholly," and "completely." Perhaps because of his senior years and apparently on medication, Gilbert proved to be a feisty person, prone to resent cross examining counsels' pressing questions. In all, nevertheless, he displayed all the manners of a hard-headed businessman fully conversant with the intricacies of major building construction, not to speak of bank lending and related practices. From his self-professed and extensive fortune and estate, indeed he has recently established and now owns a bank enterprise — Olympic National Bank (Tr. 343) and even though proposing no security, no collateral nor personal guaranties for his loan, he at one point stated that his attorney advised that the station license, if granted, would be sufficiently valuable to serve as security (Tr. 299-300, 319). On earlier occasion, Gilbert aided minority persons and organizations, and he confesses an "unexplained neurosis" in his dedication to minority matters; that he helped Duke "stay alive" and advanced monies to him "to eat." It may challenge the supposed wisdom of skeptics that a person of such obvious business sophistication — in spite of other incidents of generosity to others, a generosity greatly inferior in scale to the conditions here — would part with, or cause to be parted, the sum of $2,000,000 to principals of a commercial broadcast enterprise where, as here, principals holding 90 percent of New Radio corporation plan to or have provided only $9,000. Skepticism, however prudent, does not substitute for evidence.

114. Setting a five-year term for repayment of the $2,000,000 with an interest rate at three percentage points above prime rate is not only a stringent repayment schedule, but with all of the burdens and uncertainties of a start-up operation of a new broadcast station, at the threshold in

the very first year of operation, an immense debt burden has to be faced by New Radio. Yet, Gilbert voiced the possibility that he would forgive any default on repayment until the station became successful. Against this up-front financial burden, Duke has claimed that Gilbert provided no assistance "whatsoever" in the formation of New Radio, save referring Duke to an attorney who does work for Gilbert. Gilbert disclosed at the hearing that the loan was intended strictly for a minority-controlled enterprise, and that if New Radio were to allow non-minorities to control it, he would "divorce" himself from any relationship with Duke. Western submits that were that to occur, Gilbert's willingness to postpone repayment of the loan in the event of a default "would evaporate."

115. Gilbert also considers the proposed station an opportunity toward which he might steer persons whom he counsels, including noted black athletes and about whom Gilbert felt no need to inform Duke. In sum, Gilbert is supplying all the money to a corporation controlled by Duke, one of his employees, who would be greatly in his debt. Indeed Gilbert, under the loan terms, has established a difficult repayment schedule which he is able to adjust as he sees fit. On the other side, while conceding Gilbert as lender or banker of $2,000,000 without collateral and having an altruistic interest in minorities, New Radio would have it that Gilbert's role is simply that of "a wealthy and generous man" not in any way an undisclosed or real party in interest; nothing more, in New Radio's words, than one "whose loan commitment is a novel one, but only because Mr. Gilbert himself is a novel, indeed unique, individual." There is no "control or potential control of New Radio, but simply a friendship that rests between two men," New Radio submits.

116. Without doubt, were the loan to New Radio a gift, Gilbert would appear to be a very "generous man"; but the $2,000,000 is a *loan* coupled with an onerous repayment schedule. Yet, even were one to speculate, as does Western, that in the event of a default, Gilbert would move or step into the ultimate ownership of the proposed station, this speculation would be little different than that role of a banking or other commercial lending institution upon default. What the lender would receive would include the reachable or remaining assets of a defaulting enterprise, little else and certainly not the license. That hypothetical eventuality must run the gamut of Commission approval as with any applicant for license, albeit prospective assignees may fare with lesser burdens than an original applicant.

117. What the evidence on this issue — the question of who is the real party in interest — then comes to is that New Radio would be faced in a start-up operation with very difficult repayment conditions on the Gilbert loan; very difficult but neither impossible nor something less, most unlikely. Though unusual, perhaps very unusual in the view of doubters,

the association of a hard-headed, sophisticated and wealthy businessman, as Gilbert no doubt is, with a young person of less than considerable means, indeed a Gilbert employee salaried at about $200 weekly, it remains that under the evidence, unusual, and without more, nothing more. Hence, the evidence under this issue compels the conclusion that the determination of all relevant circumstances attendant to that issue IS RESOLVED in favor of New Radio.

SBC - Air Hazard Issue:

118. SBC has provided a determination by the Federal Aviation Administration of no hazard to air navigation by SBC's proposed site. Thus, that issue is resolved in SBC's favor.

Section 307(b) Issue:

119. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allocate broadcast facilities so as to provide a "fair, efficient and equitable distribution" among the "several States and communities" (47 U.S.C. Section 307(b)). Where, as here, two or more mutually exclusive applicants have specified different communities of license, Section 307(b) requires the Commission to determine the relative need of each applicant's proposed service area for new "reception service" and the relative need of each applicant's proposed community of license for new "transmission service" (*Radio Greenbrier, Inc.*, 80 FCC 2d 107 (Rev. Bd. 1980)). Since there is an abundance of reception services presently available throughout the areas each applicant here would serve, the respective reception services proposed by the applicants are of little decisional consequence. SBC having failed to adduce acceptable burden under this issue, its application is in great peril at this point.[20]

120. There are at least five aural nighttime services and at least two daytime services available throughout the areas of concern here. Small pockets of virtually unpopulated land area would receive a third, fourth, or fifth 0.5 mV/m daytime service from Alessandro or New Radio; New Radio would provide a third such service to a population of 50 in an area of 14 square miles but due to the small population involved, this would be of little significance; the total areas and populations covered by the applicants and the conditions that no fewer than five 1 mV/m FM or 2 mV/m services are available within the entire composite 2 mV/m areas of the five applicants. Consequently, it would now appear that "Resolution of the Section 307(b) issue therefore turns on whether the . . . communities in question . . . have distinct and differing needs for a new transmission

[20] A Joint Request for Approval of Agreement, contemplating the dismissal of the SBC application was filed, February 9, 1984. By *Memorandum Opinion and Order*, FCC 84M-1086, released March 2, 1984, SBC's application was dismissed, with prejudice.

service, and, if so, which has the greater need for the service proposed." *Public Service Broadcasting of West Jordan, Inc.*, BC Docket No. 82-366, FCC 83D-66, released November 25, 1983, at p. 9 (Initial Decision of a respected colleague).

121. Under that notion, it must be determined that there are in fact *separate* communities competing for the facility (*cf., St. Louis Telecast, Inc.*, 22 FCC 625, 712 (1957); *Cleveland Television Corp.*, 52 RR 2d 581, 587 (Rev. Bd. 1982)). In *Kent-Ravenna Broadcasting Co.*, 22 RR 605, 611 (1961), it is stated:

> "Whether a given concentration of population constitutes a community for purposes of 307(b) must, of course, be decided under the facts of each case and in accordance with the provisions of our Rules. It is not necessary for present purposes to list the various indicia of a 'community'; that this question is present at some stage in every 307(b) determination is, however, clear."

122. The typical attributes of a distinct community, among others, are its history, area and population, type of government and its public services, economic growth, business establishments, educational, transportation, cultural and recreational facilities and civic organizations. Here, it would appear that only Western and New Radio have seen fit to spell out these indicia of "community," while Orange County and SBC premise their theses of Section 307(b) on population data. Alessandro and Par have not submitted population data. In Oceanside, California, Par has two stations licensed to it; for that reason, Par cannot be preferred under the local transmission aspect of Section 307(b); Alessandro submitted evidence referring to "San Jacinto Valley" and "Hemet," but no information relating to the community of San Jacinto. Thus, SBC, Alessandro and Par suffer similar failings in not offering information and data depicting separate and distinct "community" and relevant "sociological attributes." Standing alone or together, then, San Marcos and La Mirada would be preferred over Santee, Oceanside and San Jacinto.

123. Orange County has requested reconsideration of its Exhibit 22 (rejected as not properly rebuttal but ought to have been in its direct case) because on reflection and as argued, Section 307(b) "is not technically a comparative issue" and the interest of the public, if not the ends of justice, would suggest reconsideration. Orange County Exhibit 22 will be received in evidence, and Orange County will be permitted to join in the 307(b) preferences assigned to San Marcos and La Mirada.

124. Western urges that the "phenomenal growth" of San Marcos' population between 1970 and 1980 — from 3,896 to 17,479, an increase of some 350 percent — is the critical factor of comparison with La Mirada which experienced in that same time merely only 33 percent. Thus, Western footnotes, comparison would be necessary if New Radio were found to be basically qualified. Further, Western notes, San Marcos' incorporated area is approximately 21 square miles, while La Mirada's is

but 7.78 square miles, "one-third the size of San Marcos." Additional economic factors favoring San Marcos are that in a five-year period, 1977 - 1981, assessed valuation in San Marcos more than "tripled and taxable sales nearly doubled," adds Western. Thus, it is submitted that the 1980 Census statistics are not "dispositive" in that rapid and sustained growth in population and economic base over the last decade overshadows any 1980 disparity in population levels between San Marcos and La Mirada. Hence, Western says, San Marcos must be the preferred community under Section 307(b). This, even though La Mirada's population under the 1980 Census is greater than San Marcos (San Marcos, 17,479 — La Mirada, 40,986).

125. New Radio counters saying what is sought here "is a clear channel station with potential power of 50 kilowatts, a station obviously intended to serve an extremely wide area"; that New Radio has demonstrated not only that its proposed community of license, La Mirada, "needs its own local service, but also that the 90-square mile area immediately surrounding La Mirada, an area containing 518,000 people, has *no* local broadcast services" whatsoever. Also, states New Radio citing *Notice of Proposed Rule in MM Docket No. 83-40*, FCC 83-160, released April 27, 1983, comments were invited to utilize a "metropolitan area concept" in evaluating Section 307(b) aspects of competing applications, and that the term "community should be related directly to the type or class of station sought." Using that *Notice* as a template, New Radio urges that its type facility and the 90-square mile area surrounding La Mirada with 518,000 people with *no* broadcast service should be preferred under Section 307(b); if not, then this proceeding under *Buena Vista Telecasters of Texas, Inc.*, 54 RR 2d 562 (Rev. Bd. 1983), cannot be decided under the Section 307(b) "need" factor, i.e., its "greater wide-area need," then it must proceed to disposition under the standard comparative issue.

126. Giving the required "hard look" at the evidence reflecting the facts under the Section 307(b) issue there emerges the conviction that the most favorable attributes of that Section would seem adequately to support a tilt to the San Marcos and La Mirada applicants, joined now by Orange County, over their competitors here. The critical factor of "local outlet" or first "transmission service" coupled with the broad criteria, demographic, political and social, among others, underpinning the concept of "community" at first blush would augur well for the three applicants. Yet, the line or margin of seeming preference is a fine one, indeed a very close one. Ordinarily, it would suggest that the contest under Section 307(b) should end here on the evidence of record affecting Western, New Radio and Orange County. Describing its 307(b) status, Orange County would also provide a first local outlet with a population nearly twice the size of . . . the population of La Mirada. Orange County suggests that

under Section 307(b), the "principal contenders are . . . Orange County and New Radio." "[A] disparity in population between two communities is not, of itself, dispositive of the determination of which community has the greater need for a transmission service" (*DuPage County Broadcasting, Inc.*, 19 FCC 2d 250, 253 (Rev. Bd. 1969)). The demographic and related information — the "nuts and bolts" of a Section 307(b) showing — descriptive and persuasive of a separate and distinct community at first was not demonstrated in the evidence affecting Orange County; and on that score, Orange County would have been determined to be but a runner-up in the 307(b) race, behind Western and New Radio, the nominal front runners, were not a later reconsideration given to Orange County.

127. Since, however, the Section 307(b) choice or preference cannot readily be determined, the evidence, in any event, clearly warrants the notion that either the San Marcos, Orange or the La Mirada community would be that "community" most in *need* of a first local outlet or "transmission service." But a choice among them on 307(b) criteria is hardly scrutable in the evidence. Thus, one must turn to the contingent comparative issue. As alluded to earlier, because these dispositions are hardly the last word in "final" determination, for the benefit of appellate considerations, comparative criteria governing shall be set out as to all applicants remaining in contest.

Comparative Considerations:

128. The abiding standard for criteria attending comparative choice between or among competing applicants is, of course, the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) and precedent founded thereon. There it is observed:

> " . . . that there are two primary objectives towards which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." (*Id.*, p. 394.)

Though stated there in inverse order, it has been held that, "Diversification is the primary objective toward which the comparative process is devoted" (*Snake River Valley Television, Inc.*, 26 FCC 2d 380, 387 (Rev. Bd. 1970)).

129. Under diversification, Par would rank last among the applicants because it is the licensee of two radio stations in its proposed community of license, Oceanside, California. Western, whose 70 percent stockholder holds a 98.5 percent ownership interest in the licensee of an FM station in a community outside San Marcos (FM station KKOS in Carlsbad, California) a community which lies "adjacent" to Western's proposed community of San Marcos. Orange County submits that its principals "have no interest in, or connection with, any other broadcast station or other medium of mass communication" and would rank first; New Radio,

whose five percent stockholder is a director of the licensee of a noncommercial FM radio station in Seattle, Washington, a very close second (*cf., San Joaquin Television Improvement Corp.*, 54 RR 1206 (Rev. Bd. 1983)); and Alessandro, whose stock option holder (15 percent) is a 22 percent stockholder and General Manager of KLAX-TV, Alexandria, Louisiana, and a director and Vice-President of WXOK, Baton Rouge, Louisiana, ranking third.

130. However difficult to assess on reasonable standards, diversification would slightly favor Orange County against whom no recognizable interest in the media of mass communications may be assessed; to repeat, New Radio a very close second; Alessandro, third. Western can be assessed a cognizable interest, thus a demerit, in broadcast media (its 70 percent stockholder owning 98.5 percent ownership in an FM station adjacent to San Marcos) ranked fourth; Par, because it is the licensee of two radio stations in its proposed community of license, ranked fifth.

131. The interest in the media of mass communication assessed to New Radio would be five percent of its stockholder-director of a noncommercial FM station in Seattle, Washington; Alessandro's stock option holder has cognizable interests in mass media in Louisiana (albeit Seattle, Washington, and especially Louisiana are at great distances from the communities involved in this proceeding). Again, if only for microscopic purposes of analysis, a but slight, perhaps very slight, demerit would attach to New Radio and Alessandro on diversification grounds; and if of the dimensions of *de minimis*, to other and better minds, then even the seeming slight demerits might evanesce. In that event, Orange County and New Radio could be termed in a dead heat on diversification. Since the case will not turn on diversification, this analysis or these observations may be purely academic.

Integration of Ownership and Management:

132. This criterion is subsumed under the primary objective of best practicable service to the public, *Policy Statement, supra*, and seeks to measure the quantitative aspect of that criterion as among the applicants. From the initial findings above, for purely *mathematical* reasons or grounds, the overall situation would come to this: New Radio would rank first with 90 percent full-time integration, three of its principals who are black persons will be integrated full time. New Radio is also enhanced by its principals' minority status and considerable broadcast experience of Duke and Hilburn. Western would rank second with 70 percent full-time integration. Orange County would rank third with 56.33 percent (see *infra*) full-time integration; two of its principals, who are of Hispanic heritage will be integrated full time. Orange County, in its Proposed Findings (at p. 78), citing *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817

(Rev. Bd. 1982) urges, even though not in the original application and as a fair reading of that precedent would suggest, if not compel, Somoza's proposed integration be credited full time — instead of crediting Orange County with but 33.34 percent full time — 56.33 percent which will now be accepted and credited under that precedent. Alessandro would rank fourth with 53.125 percent full-time integration; in view of the fact that, if Alessandro's application were granted, James C. Richards would become a 15 percent stockholder.

133. SBC (since dismissed) would have sought integration credit of its 25 percent stock subscriber, Joseph D. Jones, who was SBC's proposed full time General Manager. Jones, however, as a black person, plus his broadcast experience, would have been credited with enhancement of his 25 percent integration credit.

134. Par Broadcasting does not claim integration credit of any of its principals in station management; consequently, were it to be considered, its application would rank below all other applicants.

135. To revisit and recapitulate the evidence reflecting the relevant and prevailing criteria for comparison under the *Policy Statement, supra,* as that criteria affects the applicants here, New Radio with, at most, a *de minimis* diversification obstacle — a five percent shareholder's directorship in a noncommercial broadcast enterprise in Seattle, Washington — and its 90 percent full-time integration (of Duke, 70 percent; Hilburn, 10 percent; and Cantrell-May, 10 percent) enhanced by their minority status as black persons, broadcast experience and local residence, clearly, under governing precedent, would have ranked first above all applicants, absent full analysis of the residual effects under comparative consideration of New Radio's principal's murder conviction and related relevant information.

136. Orange County, under those governing criteria, having been credited with the 22.00 percent full time Somoza integration, for reasons earlier noted, with 56.33 percent full-time integration, no perceptible mass media interest, and enhanced by local residence and the minority status of two full-time participants of Hispanic heritage, would have, at this point, ranked second.

137. Alessandro's full-time integration would be 53.125 percent, a close rival to Orange County's 56.33 percent. In the event Alessandro's application were granted, James C. Richards would become a 15 percent stockholder, thereby reducing *each* of Alessandro's principal's stock percentage by 15 percent, making Alessandro's full-time integration 53.125 percent. Therefore, comparatively, Alessandro will rank below Orange County with no more than 53.125 percent full-time integration. Alessandro, even though enhanced by principals' minority status of Hispanic heritage, is also affected by a diversification deficiency, albeit

minor, of 22 percent stock ownership in a TV station in Alexandria, Louisiana, by Richards (the prospective 15 percent owner of Alessandro stock); thus, Alessandro would rank third.

138. Western, though proposing 70 percent full-time integration but with a significant diversification deficiency — a clear and substantial demerit — its 70 percent managing partner the 98.5 percent owner of FM station KKOS in an adjacent community in Carlsbad, California; even though slightly enhanced by broadcast experience, civic participation and proposed local residence, would, nevertheless, because of that diversification demerit of great significance, rank behind Orange County and Alessandro. Hence, Western's 70 percent integration, commingled with a significant diversification demerit, would blot the meaning of 70 percent to an inferior rank of Orange County's 56.33 percent and Alessandro's 53.125 percent full-time integration; thus, Western would rank fourth.

139. SBC sought integration credit for its 25 percent stock subscriber as the proposed full time General Manager; SBC's 25 percent full-time integration would have been enhanced by that person's minority status and broadcast experience, were SBC remaining in this proceeding.

140. Par, not claiming any integration credit would, of course, rank below all other applicants, comparatively.

141. Earlier, having found New Radio *basically* qualified, under the character and real party in interest issues, it was, nevertheless, also noted that the evidence of record under the character — or murder conviction issue — would be considered and treated under the criteria attending traditional comparative evaluations. Indeed, New Radio, on February 17, 1984, filed a Motion to Strike "certain portions" of Western's Reply Findings, noting that Western "quoted material [which] appears to be taken from a transcript of the sentencing hearing held in Mr. Duke's case." That Western's "extraordinary step of looking outside the record, to twelve-year-old materials . . . cannot be tolerated in this proceeding." The extra-record quality of the portions objected do not appear such. It appears very well that the challenged portions of Western's Reply fall within the broad embrace of the officially or judicially noticed record of the California proceedings affecting Duke. Under that circumstance, even though not specifically covered by cross examination at the hearing, as part of the evidence of record it may be properly addressed in proposed findings (Tr. 527, 528). Thus, New Radio's Motion[21], while considered and noted, cannot be approved and is therefore DENIED.[22]

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[21] In its Opposition filed, February 29, 1984, Western states the proposition well and echoes this disapproval.

[22] At a very late hour, March 9, 1984, New Radio filed a "Reply" under its Motion to Strike — "Reply" here is, of course, an unauthorized pleading (47 C.F.R. 1.294) but even given informal consideration would, in no way, modify this action.

142. There are, of course, several competing applicants for the construction permit at stake here; most of whom, including New Radio, have been found basically qualified to be a licensee of the broadcast facilities in contest; Alessandro's waiver request has been rejected and consequently its application must be denied. Comparatively, were New Radio standing alone, it would by the established canons be the front-runner in a race, hypothetically, at least, with no competitors. It has barely discernible diversification imperfection, but not substantial, thus not disabling — a New Radio principal 5 percent stockholder, also a director of a noncommercial FM station in distant Seattle, Washington — and its ownership/management integration attributes would otherwise given New Radio a compelling leadership of 90 percent full-time integration enhanced by minority ownership plus broadcast experience of two principals. Standing alone, a leadership of quantitative significance over its nearest rival, Orange County with 56.33 percent integration credit, also enhanced by minority ownership. But all of this seeming strained analysis (comparative contests seem burdened with the mandate) must be laid aside; particularly as it relates to the applicant, New Radio.

143. Unlike the stance of New Radio that "the focus of proofs under the conviction issue is extremely narrow . . . that it has challenged throughout the proceeding the addition of the conviction issue" (New Radio's Motion to Strike at pp. 3, 4), the "proofs" speak clearly from the various official records of the California Court which convicted and sentenced Duke, and which have been received by official notice in this record *in their entirety*. And it would be less than good advocacy not to attempt to prevent the addition of the conviction issue; that being a good lawyer's customary duty, but little more.

144. Here, unlike New Radio's rivals in contest (none of whom have been found wanting in any such respect in the evidence), New Radio's principal, Clarence Duke, has been charged, found guilty, convicted and sentenced for murder in the second degree. The record of his court proceedings reflect the remarks of the Court, in the sentencing transcript at p. 3, "The Court is further of the opinion . . . that if a jury had heard this matter, it could just as well have been first degree murder as second . . .." Hardly a circumstance so narrowly contrived of a person "enraged" and merely "one serious mistake" as New Radio would have it.[23] None of the other applicants or their principals under the evidence here bear the taint

[23] Western, in its Reply, relates "After discovering his wife with another man, Duke left the scene to secure a weapon, returned, and then shot and killed the man through the bathroom door, which had been locked," citing Orange County Ex. 19 at pp. 30-33; adding, "Since Duke had to depart the scene to retrieve a gun, he had much more than a 'moment' to consider his actions" (Western Reply at p. 4). This describes much more than "one serious mistake."

of public shame and revulsion (however overwhelming a personal burden) of the crime of murder attaching to New Radio's principal, Duke. Here, also unlike the situation in *Chapman Radio and Television Co.*, 47 FCC 2d 775 (Rev. Bd. 1974); *vacated* and *remanded* on *other grounds*, 57 FCC 2d 76 (1975); *recon. den.*, 36 RR 2d 1189 (1976); no steps have been taken to remove New Radio's principal, Duke, from its application. He steadfastly remains as its principal.

145. As the *Policy Statement, supra*, observes that in the absence of outright disqualification on character grounds, "substantial demerits may be appropriate in some cases where disqualification is not warranted" (p. 399). Western quite accurately footnotes that rather than a proffered "model" citizen, even during this proceeding, New Radio's principal has been hardly that "model" during his time on the witness stand (*See*, Western's Reply at p. 7, fn. 9). Perhaps the hurt and trauma of imprisonment are not easily forgotten or ever fully cured. Yet, Duke's demeanor as a witness was somewhat less than exemplary for one seeking a franchise of great public trust. He was, at best, combative, evasive and sullen to the valid inquiries of cross examining counsel. Thus, he added little to the notion supportive of the contention that he is fully endowed with the minimal attributes expected of a trustee of a public franchise. Hence, it is a compelling conclusion that New Radio, under the overall evidence, testimonial as well as documentary as they relate to the person of its principal, comparatively, must be assessed a substantial demerit and it is so concluded.

146. That substantial demerit would permeate as a pervasive presence in the ownership and management of the New Radio applicant, a presence that totally undermines the 70 percent integration credit attribution to Duke. Hence, New Radio's quantitative integration proposal must fall in great dimension leaving at most full-time participation of its 10 percent stockholder, Hilburn, and full-time participation of its 10 percent stockholder, Cantrell-May — in sum, 20 percent integration credit. With no cognizable interests in other mass media and with 56.33 percent integration enhanced by local residence and the minority status of those credited with that percentage, Orange County, on balance, would be the compelling and logical choice, comparatively. Par, SBC, indeed Alessandro, all fall below Orange County under integration credit. Western would be basically superior on integration (70 percent), but it has significant broadcast interests in close-by Carlsbad, California, reducing that 70 percent in overall comparative evaluation and effect at least below Orange County's 56.33 percent and no media interests. Par, with a significant demerit for its broadcast facilities in Oceanside and no integration credit, is clearly last, comparatively.

147. In summary, then, the evidence under Section 307(b) has been found insufficient and inconclusive to select a preferred applicant among those who demonstrated two cardinal attributes needed to resolve that issue: (a) one who would demonstrate an identifiable separate and distinct community, one (b) a first transmission service or local outlet for that community. New Radio (La Mirada), Orange County (Orange), Western (San Marcos), and SBC (Santee) all appear to qualify in that respect, if not equally, indistinguishably. Hence, in this view, this contest must turn on accepted and traditional comparative grounds. And on these grounds, as reflected in the evidence, Orange County must prevail.

For the foregoing reasons, the applications of Orange County Broadcasting Corporation for the captioned facilities at Orange, California, may be AND IS HEREBY GRANTED; that being so, the applications of Alessandro Broadcasting Company, Western Radio Group, New Radio Corporation and Par Broadcasting Company must be AND ARE HEREBY DENIED.[24]

The grant to Orange County Broadcasting Corporation is further conditioned by the *caveat* in the *Designation Order*, to wit:

> "Operation with the facilities specified herein is subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the Final Acts of the ITU Administrative Conference on Medium Frequency Broadcasting in Region 2, Rio de Janeiro 1981, and to bilateral and other multilateral agreements between the United States and other countries." (At p. 9.)

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Administrative Law Judge*

[24] In the event exceptions are not filed within *30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Accounting Regulation Rules, Amendment of

Report and Order establishes new accounts to record carriers' access revenues and expenses required in Docket 78-72 *(Access Charge Order.* These changes revise Part 31 of the Commission's Rules and Regulations and corresponding revisions to the Annual Report Form M and FCC Report 901.
—Amendment of Part 31
BC Docket No. 83-1347

FCC 84-486

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies of the Commission's Rules and Regulations and conforming amendments to Annual Report Form M and FCC Report 901	CC Docket No. 83-1347

REPORT AND ORDER

Adopted: October 17, 1984; Released: October 29, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. Introduction

1. In a Notice of Proposed Rulemaking (NPRM) released on December 21, 1983, 49 Fed. Reg. 1245, the Commission proposed to revise Part 31, "Uniform System of Accounts (USOA) for Class A and Class B Telephone Companies," (47 C.F.R. Part 31) to establish new accounts to record the carriers' interstate and intrastate access revenues and expenses. We also proposed conforming amendments to the Annual Report Form M (Annual Report for Class A and Class B Telephone Companies) and FCC Report 901, "Monthly Report of Revenues, Expenses, and Other Items — Telephone Companies." These changes were proposed because Part 31 does not have proper accounts in which carriers can record the access revenues and expenses established by the Commission's decision in the Third Report and Order in *MTS and WATS Market Structure* (*Access*

Charge Order), CC Docket No. 78-72,[1] or that may be required by various state proceedings.

2. Based on an analysis of the comments received in this proceeding, we have decided to adopt, with one minor change, the accounting revisions proposed in our NPRM. We have also decided to make the conforming amendments to the Annual Report Form M and the FCC Report 901. The amendments adopted herein will become effective six months after publication of this Report and Order in the Federal Register, except we will allow any carrier, at its option, to adopt these changes for calendar year 1984.

II. Background

3. By our *Access Charge Order* we restructured the method by which exchange carriers will charge subscribers and interexchange carriers for access to the exchange carriers' facilities for interstate telecommunications services. Further, our decisions in that order created new tariff categories covering end user charges and carrier's carrier charges. Finally, a tariff covering billing and collection charges was also required in those instances where a carrier provides such services. As a result of these changes we need to amend our accounting system to provide new accounts to record the revenues and expenses resulting from services provided under these new tariff categories.

III. Proposed Revision

4. In order to meet our objectives of providing accounts for access revenues and expenses and providing detailed accounting support for the Commission's review function, we proposed to amend Part 31 of our Rules and Regulations by creating several new accounts. We proposed accounts 508, "Interstate access revenues," and 509, "Intrastate access revenues," to account for the revenues resulting from the federally tariffed access charges and state tariffed access charges, respectively. This separation would allow the Commission to identify and monitor access revenues relative to interstate telecommunications. We also proposed to require the exchange carriers to subdivide the interstate revenues in account 508 into three subaccounts: End user revenues, Carrier's carrier facilities revenues, and Special access revenues. The end user subaccount would include all revenues collected by the exchange carriers under the interstate end user tariff element in accordance with Part 69 of our Rules. The carrier's carrier facilities subaccount would include all revenues collected under the carrier's carrier interstate facilities tariff elements, and the special access subaccount would include all revenues collected under the interstate special access tariff element.

[1] 93 FCC 2d 241 (1983), *reconsideration* FCC 83-356, 48 Fed. Reg. 42987 (1983) *further reconsideration*, FCC 84-36 49 Fed. Reg. 7810 (1984).

5. We proposed account 657, "Interstate carrier's carrier expenses," to record all federally tariffed access charges incurred by the interexchange carriers for access to the exchange carrier's facilities. We also proposed account 658, "Intrastate carrier's carrier expenses," to account for all state tariffed access charges incurred by the interexchange carriers for access to the exchange carriers' facilities.

6. Further, we proposed accounts 527, "Billing and collection revenue," and 647, "Billing and collection expenses." Account 527 would include all revenues collected under the billing and collection tariff element. Account 647 would be used to record expenses incurred by an interexchange carrier or other exchange carrier for having another exchange carriers bill and collect for domestic or international telecommunications services.

7. In addition to the new accounts we proposed to require exchange carriers to maintain supporting records that would enable them to identify revenues by federally tariffed access element. We also proposed to require interexchange carriers to maintain supporting records that would enable them to identify access expenses by federally tariffed access element.

8. Finally, in line with our proposed changes to Part 31, we proposed to make conforming changes to the Annual Report Form M and FCC Report 901 to reflect the proposed accounts. The proposed changes in the schedules were:

A. Form M, Schedule 34, Operating Revenues - to add accounts 508, 509 and 527.

B. Form M, Schedule 35, Operating Expenses - to add accounts 647, 657 and 658.

C. Amend FCC Report 901 to reflect the proposed accounts.

IV. Summary of Comments

9. Interested parties were invited to file comments on our proposal on or before January 27, 1984 and reply comments on or before February 13, 1984. Comments were received from the Arkansas Public Service Commission (APSC); International Communications Association (ICA); Public Utilities Commission of the State of California (California); Tennessee Public Service Commission (TPSC); United States Telephone Association (USTA); and United Telephone System, Inc. (UTS). Comments and reply comments were received from American Telephone and Telegraph Company (AT&T); GTE Service Corporation (GTE); MCI Communications Corporation (MCI); National Exchange Carrier Association, Inc. (NECA); Southern New England Telephone Company (SNET) and The Operating Telephone Companies (OTCs).[2]

[2] The Operating Telephone Companies include the following Bell Operating Companies: NYNEX Service Company on behalf of New England Telephone Co. and New York Telephone Co.; New Jersey Bell Telephone Co.; the Bell Telephone Company of

10. While the respondents generally agreed that new accounts for access are needed, they did not completely agree with our proposal and instead offered some of their own recommendations for accounting for access. The comments we received focused primarily on three major areas of concern. These were: (1) whether access charges should be recorded as reductions to revenues of the interexchange carrier instead of as operating expenses, (2) whether jurisdictional distinctions should be used as a basis for establishing accounts within Part 31, and (3) whether our proposal for access accounting provides sufficient information to enable the Commission to exercise its oversight. After we address these three areas of concern, we will then address the other issues which were raised in the comments to our proposal.

11. *Treatment of carrier's carrier access payments.* Perhaps the most significant issue was raised by AT&T in its recommendation to record access charges as a reduction to the revenue of the interexchange carrier rather than as an expense as we proposed. AT&T suggests a netting approach by which payments to exchange carriers for carrier's carrier access charges are treated as a reduction in the revenue accounts of the interexchange carrier by means of contra-revenue accounts. AT&T gives several reasons in support of its netting approach. First, AT&T states that the proposed accounting rule for access revenues and expenses would cause a significant overstatement of telecommunications industry revenues. The claimed overstatement would result from access charges being counted as revenue twice—once as revenue to the interexchange carrier for interexchange calls and again as revenue to the exchange carrier for access charges paid to the local exchange carrier. Second, AT&T states that historically payments made to Bell Operating Companies and to Independents to compensate them for their costs were treated as a reduction to the revenues of the interstate carrier and that this has been the accepted way of recording and presenting revenues for each of the carriers and for the industry as a whole. It states that although the access charge plan replaces the settlements process for compensating local exchange carriers, the exchange carriers will continue to be the ultimate providers of local access facilities and they ultimately will receive the revenues for providing this access. Thus, AT&T claims that it is appropriate to account for payments to exchange carriers for carrier's carrier access charges as reductions to revenue of the interex-

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Pennsylvania; the Diamond State Telephone Co.; the Chesapeake and Potomac Telephone Companies of Washington, D.C., Virginia, Maryland, and West Virginia; Southern Bell Telephone and Telegraph Co.; South Central Bell Telephone Co.; Ohio Bell Telephone Co.; Michigan Bell Telephone Co., Indiana Bell Telephone Co.; Illinois Bell Telephone Co.; Wisconsin Bell; Northwestern Bell Telephone Co.; the Mountain States Telephone and Telegraph Co.; the Pacific Northwest Bell Telephone Co.; Pacific Bell; Nevada Bell; and Southwestern Bell Telephone Co.

change carrier to avoid a discontinuity between the pre-divestiture and post-divestiture revenue reporting procedures prescribed by the Commission. Since a portion of the carrier's carrier access charges will be a transitional charge to be replaced in steps by end user charges, AT&T states that using contra-revenue accounts will also avoid multiple future repetitions of the discontinuity. It claims that, unless a contra-revenue account is used, each change in the way amounts for local access are collected will produce a change in revenues reported by the industry and by interexchange carriers even if the amounts collected from users remains exactly the same.

12. Third, AT&T believes that the revenues reported by an interexchange carrier should reflect only revenues attributable to the provision of interexchange services since that is the only segment of telecommunications services that the interexchange carrier directly provides. Further, AT&T states that interexchange rates include an amount sufficient to recover local access charges and, unless its netting approach is adopted the interexchange carriers, which provide no local service, will be reporting these local access charges as part of their revenues.

13. Finally, AT&T states that our proposed access accounting may have gross receipts tax implications. Because access charges are being counted twice, AT&T contends that local tax authorities may seek to tax these same amounts twice and thereby attempt to place an unjust burden of double taxation on ratepayers from whom such additional amounts would have to be recovered. AT&T estimated a possible tax impact of $225 million by applying its 1984 budgeted access charge amount to the prevailing gross receipts tax rate by state.

14. In its reply comments MCI argues against the suggestion that carrier's carrier access charges should be netted against the interexchange carrier revenues. MCI believes that gross operating expenses must be reported to reflect the organizational independence of companies in the new environment. MCI maintains that access charges are a cost of operation for all interexchange carriers, that netting or the use of contra-revenue accounts would destroy the comparability of financial statements among interexchange carriers and that this lack of comparability would preclude the reader of a financial report from analyzing trends within a company. MCI states that the claim that failure to net will distort industry statistics has no validity because there is no such thing as financial reporting for an industry as a whole. MCI contends that the netting treatment would be inconsistent with the principle of financial reporting promulgated by the Financial Accounting Standards Board in its "Statements of Financial Accounting Concepts" which asserts that financial reports should disclose the relevant information of a company's economic affairs. In connection with the issue of overstatement of industry

revenues and AT&T's problem with the gross receipts tax, MCI states that while avoidance of double taxation is a valid concern, double taxation can usually be avoided by taking advantage of appropriate exemptions. MCI contends that the availability of such exemptions does not depend on "netting" for accounting purposes. Finally, MCI claims that the netting of revenues and expenses is at variance with the principle of revenue measurement and that access charge expenses do not qualify as offsets to revenue.

15. In its reply comments AT&T reiterates its argument against recording access charge payments by interexchange carriers as operating expenses. AT&T states that the accounting and resulting financial reports should accurately reflect the relationship between the interexchange carriers who make the access charge payments and the exchange carriers who ultimately receive these amounts. AT&T contends that the relationship between the interexchange carrier and exchange carrier differs from that in other industries. What is unique, AT&T argues, is that while a complete service is provided to interstate telecommunications customers, the facilities used to provide each segment of that service are provided by separate carriers that are responsible for their own particular facilities and each carrier is entitled to a return only on its own facilities. AT&T further states that if access charges are treated as an expense to the interexchange carrier, the total billings to customers must necessarily remain as part of the revenues of the interexchange carrier and be reflected on financial statements as if the interexchange carrier had provided the facilities for both local access and interexchange transport. AT&T contends that if access charges are treated in this manner the usefulness of the resulting financial statements would be diminished.

16. *Jurisdictional identification of revenues.* Eight of the commenters support the creation of separate accounts for federally tariffed and state tariffed access charges. GTE, OTCs, USTA, and UTS oppose the creation of interstate and intrastate access revenue and expense accounts as proposed in the NPRM. GTE contends that the creation of additional accounts reflecting jurisdictional distinctions is unnecessary and a departure from the scheme of the present Part 31 by moving a Part 67 activity into Part 31. GTE believes that creating accounts that reflect jurisdictional distinction would raise a legal problem with Subsection 410(c) of the Act which provides that the Commission shall refer to a federal-state joint board any proceeding concerning the jurisdictional separation of common carrier properties and expenses between interstate and intrastate operations. The OTCs state that while the Commission's proposal to separate interstate and intrastate access revenues and expenses does not present any significant administrative problem to the telephone companies, it creates a potential inconsistency with the approach now required under

the existing USOA. USTA suggests that the Commission should be careful in this docket to avoid jurisdictional and customer oriented approaches as a basis for prescription of carrier accounts and maintains that if jurisdictional or customer data are needed, they could be provided in such reports and subsidiary records as the Commission may require. UTS states that there is no need for interstate and intrastate account structures if carriers are required to maintain supporting records that identify revenues and expenses by tariffed access elements because all regulatory information needs could be satisfied through specified accounting rules, procedures, and supporting subsystems.

17. Both AT&T and MCI state in their reply comments that contrary to the suggestion of GTE, establishing separate revenue accounts for interstate and intrastate access charges would not require convening a joint board. AT&T states that Subsection 410(c) of the Act pertains only to jurisdictional separations of common carrier properties and expenses and not to revenues. Also, AT&T states that, since access charges are tariffed interstate and intrastate, merely requiring that the amounts paid under these tariffs be recorded separately would not be a jurisdictional separation issue within the contemplation of Subsection 410(c).

18. Several of the commenting parties suggested that the Commission go one step further and require that billing and collection revenues and expenses be accounted for separately between interstate and intrastate. These parties state that such a requirement would enable the Commission to identify and monitor billing and collection charges in the same way that it would be able to monitor access charges. NECA argues that it needs jurisdictionally separated revenues to perform its mandated functions. However, NECA states that if the Commission determines that revenues need not be jurisdictionally identified in the USOA, NECA could obtain the data it needs from supporting records of exchange carriers. In its reply comments GTE states that it finds no logic in forcing jurisdictional distinctions into billing and collection accounts under Part 31, and it believes that the nature of billing and collection is quite distinct from the imposition of access charges.

19. *Sufficient information.* MCI and ICA were concerned about the sufficiency of the information the Commission proposed to require in the NPRM. In its comments MCI states that the amendments proposed are not sufficient to enable the Commission to exercise its oversight. MCI states that the Commission should require the establishment of separate subaccounts for the recording of revenues and expenses by feature groups. MCI believes that the Commission should also require the reporting of cost data with the same degree of detail as MCI wants for the revenue accounts. MCI asks that separate accounts to reflect directly assignable expenses common to all feature groups be established and

suggests that consideration be given to the establishment of subaccounts to distinguish different types of special access revenues, such as voice grade or wide band.

20. ICA recommends that our proposed accounting be modified so as to require exchange carriers to segregate both revenues and expenses between recurring and nonrecurring amounts for both interstate and intrastate access charges. ICA contends that such a separation would enable the Commission to investigate and subsequently monitor these charges. ICA also contends that its proposal would allow the Commission to reduce its reliance on special carrier studies when reviewing carriers' recurring and nonrecurring access charges.

21. In its comments NECA states that while it agrees the proposed account for interstate access revenues should be subdivided into three subaccounts, it believes the revenues to be recorded in each of these subaccounts should parallel the mandatory and voluntary revenue pools established in the Commission's *Access Charge Order.* NECA recommends the following subaccounts: (1) end user revenues, (2) carrier common line revenues, and (3) traffic sensitive revenues. The end user revenues subaccount is to be the same as that proposed in the NPRM; the carrier common line subaccount is to include all revenues collected under the carrier common line usage elements of the interstate access tariffs and the special access surcharge revenues; and the traffic sensitive revenues subaccount is to include all revenues collected under tariff elements which the Commission has defined as traffic sensitive in its *Access Charge Order*, as modified on reconsideration, in CC Docket No. 78-72.[3] The OTCs suggest that in view of the Commission's expressed intention in Docket 78-72 to shift a substantial part of the cost recovery burden for interstate access from the carrier common line charge and the special access surcharge to customer line charges, a new account be created to record these revenues. The OTCs further suggest that this new revenue account be divided into subaccounts for customer line charges, carrier common line charges and special access surcharges.

22. TPSC states that modifications should be made to the account description proposed in the NPRM for account 509. TPSC suggests language to modify account 509 to require that it be subdivided in the same manner as account 508, as appropriate, in each state jurisdiction. TPSC contends that the language it proposes to account 509 would allow necessary state regulatory flexibility while not requiring the Commission to try to anticipate what the several states may do.

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[3] NECA states that the traffic sensitive revenues are defined as: Limited Pay Telephone, Line Termination, Local Switching (LS1 and LS2), Intercept, Information, Common Transport, Dedicated Transport, and Special Access.

23. UTS states that the subaccounts proposed in the NPRM are unnecessary and contends that since the NPRM proposes to require that carriers maintain supporting records for identifying revenues and/or expenses by tariffed access element, all regulatory information needs could be satisfied through special accounting rules, procedures and supporting subsystems. UTS states that the proposed revenue subaccounts place an unnecessary restriction on exchange carrier accounting procedures and systems and that such details are inherent in accounting subrecords and supporting systems.

24. NECA states that the detailed subaccounts proposed by MCI and ICA are inappropriate, would infuse the accounting systems of exchange carriers with unnecessary complexities and in many cases would be administratively burdensome. NECA contends that an accounting system must be stable over time and that the adoption of MCI's suggestions would require embodying in the USOA the access charge transitional mechanism adopted by the Commission.

25. In their reply comments the OTCs state that the greater accounting detail suggested by MCI would create a less flexible and more expensive accounting system. The OTCs contend that they are unable to segregate expenses by special access classes of service or by feature group. The OTCs state that Part 67 of the Commission's Rules governs interstate expense allocation and that MCI's proposal would introduce recordkeeping based on jurisdictional separation into Part 31. The OTCs argue that the further segregation of revenues which MCI proposes would be a meaningless distinction without any public benefit, would create an additional cost burden for ratepayers and would entail a considerable expense to the telephone companies. The OTCs also state that they do not agree with NECA's recommendation that interstate access revenues should be subdivided into three subaccounts which parallel the mandatory and voluntary revenue pools established in the Commission's *Access Charge Order* because pooling arrangements are not identical for all telephone companies and it is possible that pooling arrangements will change in the future.

26. *Other issues.* Several other issues were raised in the comments the Commission received. AT&T and MCI both state that sufficient data must be provided by the local exchange carriers to allow the interexchange carrier, which does not perform the call recording function, to identify separately access charge amounts for the state and interstate jurisdictions and to maintain supporting records which permit identification of access charges by federally tariffed access element. The OTCs contend that existing telephone company billing for switched access charges presently permits AT&T to identify costs by federally tariffed rate element and by jurisdiction. GTE states that this proceeding is not

the appropriate vehicle for consideration of AT&T's proposed billing detail requirements and that if AT&T wishes to pursue this issue, it should file a petition for rulemaking.

27. GTE, OTCs, and USTA comment that the Commission should make a concerted effort to adopt interim changes to Part 31 which will support the general concepts developed by the Telecommunications Industry Advisory Group (TIAG) in revising the Uniform System of Accounts.[4] AT&T states that the ongoing work in connection with CC Docket No. 78-196 should not be a controlling factor in this proceeding.

28. UTS and OTCs state in their comments that the Commission's proposed rules might require that the same transaction be recorded as access revenues and access expenses when the interexchange carrier and the exchange carrier are the same entity for certain interstate routes. The OTCs argue that such a situation where a carrier would internally charge itself to reflect both access revenues and expenses is meaningless and also a violation of generally accepted accounting principles. UTS urges a classification of the definitions of "local exchange carrier," "other exchange carrier," and "interexchange carrier" in the proposed rules to prevent duplicate reporting of the same transaction in the event parallel functions are performed by one carrier.

29. In their comments the OTCs requests that the terms "tariffed access element" and "special access" be defined. The OTCs state that it is unclear whether "special access" refers to the $25 surcharge which is to be imposed on nonmeasured access lines or to the charges relating to a broader category of access functions. California recommends that the Commission modify the NPRM's proposed accounting amendments to reflect the FCC's postponement of the imposition of the interstate access charge on residential and single line business customers until mid-1985. California also recommends that a note be added to the account description for intrastate access revenue to reflect the fact that the subdivision of this account and supporting documentation required of carriers will be addressed by the state regulatory authorities having primary rate jurisdiction. SNET states that it is planning to make the NPRM's proposed accounting revisions effective with access tariff implementation on the assumption that the Commission will make no changes to the account structure as proposed in the Notice. SNET states that if changes do occur to the proposed accounting amendments, SNET could not readily implement the changes without significant additional expenditures. APSC states that it does not support the NPRM's proposal to make the accounting revisions effective six months after a final decision is issued, nor does it support the proposal to permit carriers voluntarily to implement these revisions when the access tariffs are implemented. APSC

[4] CC Docket 78-196, 88 FCC 2d 83 (1983).

recommends that the NPRM's accounting revisions be made retroactive to the date the access tariffs are implemented.

V. Discussion

30. *Treatment of carrier's carrier access payments.* Of the comments we received, only AT&T urged the Commission to adopt a netting approach and treat carrier's carrier access charges as a reduction to the revenue of the interexchange carriers. It expressed concern that without the use of contra-revenue accounts, access charges will cause a discontinuity between pre-divestiture and post-divestiture revenue reporting procedures and will cause a significant overstatement of industry revenues.

31. It must be recognized, however, that because of divestiture, today's telecommunications environment has changed—the industry, now operating in an environment composed of interexchange carriers and exchange carriers, will no longer be characterized by the sharing of revenues that existed in the pre-divestiture period. Users of financial data will have to adjust to the changes in the environment and will have to consider the effects of these changes in their analysis. It is incumbent upon the providers of the financial information to disclose the pertinent facts of the changes.

32. AT&T also states that the revenue reported by interexchange carriers should reflect only revenues attributable to the provision of interexchange services since that is the only segment of telecommunication services that the interexchange carrier directly provides. However, we consider the access elements discussed herein to be part of the interexchange service provided to the customer and the cost of providing it to be part of the total operating expense of interexchange carriers. As such, it should be accounted for as an expense item rather than as a contra-revenue item. Likewise, the interexchange carrier should record as a revenue the amounts collected to cover the cost of these elements of the service it provides to customers. Our proposed accounting, therefore, merely reflects what is in the carrier's tariffs which are established at levels to recoup total expenses—part of which is access. Accordingly, the carrier will be required to record as revenue the total amounts that are collected under its Federal tariffs. When amounts are netted in the manner proposed by AT&T, the revenues recorded no longer reflect the Federal tariff, and as MCI has stated, the procedure would be at variance with the generally accepted accounting principle of revenue measurement. In contrast, we believe that our proposed accounting requirements are a proper reflection of the economic and structural realities of today's telecommunications environment which does not provide for revenue sharing as it did before divestiture.

33. In a footnote to its comments AT&T raises the question of a potential $225 million impact our proposal may have on its gross receipts taxes. While we understand AT&T's concern, we do not believe that creating contra-revenue accounts to reduce revenues is the solution. Furthermore, classifying access charges as contra-revenues for tax purposes is a matter outside our jurisdiction. When or where access revenues are in substance subject to gross receipts tax is an issue for the various taxing authorities. In this proceeding it is our purpose to prescribe accounting and reporting requirements that provide a clear picture of a carrier's operations.

34. *Jurisdictional identification of revenues.* In our NPRM we proposed to establish separate revenue and expense accounts for federally tariffed access charges and state tariffed access charges to allow us to identify and monitor access revenues and expenses relative to interstate telecommunications. While eight of the twelve comments we received were in favor of our creating separate accounts for federally tariffed and state tariffed access charges, several of the comments object to our reflecting jurisdictional distinctions in the USOA. Several commenters also stated that the segregation by jurisdiction may require referral to the Joint Board.

35. While the existing USOA does not now require separate accounts for interstate and intrastate revenues and expenses, we do not find this to be sufficient reason for not providing jurisdictional accounts. Because access charges are tariffed interstate and intrastate, they are readily determinable and are capable of being recorded in appropriate jurisdictional accounts. Such separate accounts would aid us in the identification and monitoring of access charges.[5] We do not agree with those commenters who state that the segregation by jurisdictions may require referral to the Joint Board. We are requiring only that revenues and expenses *that have already been identified by jurisdiction* be accounted for separately. For this separate jurisdictional accounting no Joint Board procedure is required. The recording of the revenues and expenses by jurisdiction does not bind the Joint Board or the state and Federal commissions from considering any or all of the expenses so recorded in appropriate proceedings.

36. Several parties suggest that we create accounts to record separately interstate and intrastate billing and collection revenues on the exchange carriers' books and to create separate accounts to record interexchange carriers' interstate and intrastate billing and collection expenses. We agree with this suggestion and therefore have decided to

[5] We are publicly committed to intensive monitoring of the impact of our Access Charge Decision. *See* Further Reconsideration order at para. 9. Without adequate accounting we cannot fulfill our commitment.

adopt it. Because of the sensitive nature of these costs and the rapidly changing environment it is important for the Commission to monitor billing and collection revenues at least on an interim basis. This requirement will enable the Commission to identify and monitor billing and collection charges in the same way we will be able to monitor access charges.

37. *Sufficient information.* We do not share MCI's and ICA's view that our proposed account structure for access needs to be further disaggregated. Requiring further disaggregation of the access accounts to obtain more detail is not needed at the current time and cannot be justified in light of the burden that would be placed on the carriers. We also do not agree with NECA's recommendation that interstate access revenues should be divided into end user revenues, carrier common line revenues and traffic sensitive revenues in order to parallel the mandatory and voluntary revenue pools established in the Commission's *Access Charge Order.* We see no need to create subaccounts to parallel the mandatory and voluntary revenue pools because pooling arrangements are not identical for all telephone companies. It is also possible that these pooling arrangements will change in the future.[6]

38. Because we are requiring carriers to maintain documentation to identify each tariffed element of the carrier's carrier facilities revenues and each surcharge element collected under special access charges, we believe that the accounts and subaccounts we are creating are sufficient to enable us to monitor access charges and to exercise our oversight function. Therefore, we see no need to adopt the OTCs' suggestion that the tariffed elements of carrier common line charge, special access surcharge and end user charges be subaccounts of a new revenue account.

39. There is no need to adopt TPSC's suggestions that account 509 be subdivided in the same manner as account 508 since tariff requirements for state access revenues will vary from state to state. However, the states have the necessary regulatory flexibility to determine their own data needs and requirements.

40. We cannot agree with those commenters who took the position that the subaccounts and access element data that we are requiring are unnecessary. To do our analysis, it is important for us to receive information from the carriers that is maintained in a consistent manner. This can only be done by requiring carriers to maintain data in a prescribed manner. Moreover, because the access revenue and expense data we are requiring is significant in dollar amounts and will be recurring in nature, they should be recorded in appropriate accounts.

[6] NECA also noted in its comments that it has the ability to obtain from the carriers data required to perform the settlement function.

Furthermore, the creation of specific accounts and reporting requirements will contribute to the Commission's goal of reduced reliance on special carrier studies for use in routine regulatory tasks.

41. *Other issues.* Several other issues were raised in the comments to our NPRM. AT&T requests that the exchange carriers be required to supply sufficient data to interexchange carriers for interexchange carriers to identify separately access charge amounts for the state and interstate jurisdictions, and that the exchange carriers be required to maintain supporting records which permit identification of access charges by federally tariffed access element. This request of AT&T deals with the imposition on exchange carriers of a requirement concerned with billing details furnished to interexchange carriers and as such clearly falls outside the scope of this proceeding. CC Docket 83-1145, *Investigation of Access and Divestiture Related Tariffs*,[7] has addressed the bulk of the problems dealing with the exchange carriers' provision of the data that is essential for an interexchange carrier to comply with the accounting and record maintenance requirements proposed in this proceeding.

42. Several of the comments dealt with the work of the TIAG to develop a revised USOA and recommended that the Commission adopt interim changes to the USOA which are consistent with the approach and concepts developed by the TIAG. We believe that the changes in this proceeding are consistent with TIAG recommendations which we presently have under consideration. As we stated in our NPRM, the proposed changes in this proceeding are interim changes to the USOA. Our accounting requirements for access may be further revised, and we expect those revisions to be reflected in the final rewrite of Part 31 in Docket 78-196.

43. UTS and OTC brought to our attention those situations where the interexchange carrier and the exchange carrier for certain interstate routes may be the same entity. When this situation occurs for a carrier, that carrier would not internally charge itself both access revenues and expenses. The new accounts we are adopting are for recording transactions between carriers which are separate entities. A carrier would record access revenues or expenses only when it receives or else provides access to another entity under the terms of its access tariff.

44. UTS urged a classification of the definitions of "local exchange carriers," "other exchange carrier" and "interexchange carrier." These three terms are used in our account description for the billing and collection accounts. We used the term "local exchange carriers" to describe those exchange carriers which provide billing and collection services for interexchange carriers and other exchange carriers. These other exchange carriers would be primarily small independent telephone

[7] 48 Fed. Reg. 49918. October 28, 1983.

companies. Finally our reference to interexchange carrier means any carrier subject to Part 31 of our Rules that pays access charges to an exchange carrier.

45. The OTCs requested that the terms "tariffed access element" and "special access" be defined. Tariff access elements are those access elements prescribed in Part 69 of our Rules. Special access is defined in the *Access Charge Order.* Currently, the special access revenues refer to the $25 surcharge which is to be imposed on certain private lines and all revenues under the special access element as described in Section 69.115.

46. We cannot accept California's recommendation that the Commission modify the NPRM's proposed accounting amendments to reflect the FCC's postponement of the imposition of the interstate access charge on residential and single line business customers until mid-1985. While the residential and single line business customers' charges have been postponed, there are already in place customer line charges for multiline business customers. The mere fact that some customer line user revenues have been postponed does not eliminate the need for the revenue subaccount, nor does it make that subaccount description wrong. We also see no need to follow California's recommendation that a note be added to the account description for intrastate access revenue to reflect the fact that the subdivision of this account and supporting documentation required of carriers will be addressed by the state regulatory authorities. All state commissions are well aware of their jurisdiction and what aspects of the carriers' services fall into that jurisdiction.

47. We were concerned with SNET's statement that it planned to implement our NPRM's proposed accounting revisions under the assumption that the Commission would make no changes to the account structure proposed in the Notice. SNET further stated that if the Commission does make changes to the proposed accounting revisions, SNET could not readily implement the changes without significant additional expenditures. We wish to remind SNET that a Commission NPRM is merely a proposal which is subject to change. Incurring the cost of implementing proposed accounting rules before they are finalized by the Commission seems to be a management decision which we will not judge the merits of in this proceeding. However, knowingly implementing a proposed accounting system when it is only a proposal and subject to change should not be used as a reason to dissuade the Commission from adopting changes it determines are necessary.

48. Finally, APSC recommended that our accounting revisions be made retroactive to the date that the access tariffs were implemented—instead of making them effective six months after a final decision is issued. We are bound by the statutory requirements of Section 220(g) of the Communications Act of 1934, as amended, which states that "notice of

alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect." Although we are bound by these statutory requirements, we encourage carriers to implement voluntarily these revisions as soon as possible.

VI. Other Matters

49. In compliance with the provisions of Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §605(b), we believe the above discussion sets forth the purpose of the proposed amendments. We certify that the accounting changes can be readily implemented by all carriers subject to Part 31 without significant economic impact.

50. The collection of information requirements contained in this rulemaking have been submitted to OMB for review under Section 3504 of the Paperwork Reduction Act of 1980, 44 U.S.C. §35. All questions concerning the collection requirements should be directed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Federal Communications Commission." *See* 5 CFR §1320.13(a).

VII. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to the Provisions of Section 4(i) and 220(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 220(a), that Part 31 is hereby amended as set forth in Appendix A, effective six months from the date that this item is published in the Federal Register except where a carrier chooses to adopt these changes effective no earlier than January 1, 1984.

52. IT IS FURTHER ORDERED, That the FCC Annual Report Form M is hereby revised as set forth in this Order and Appendix B effective with the Form M for calendar year 1984.

53. IT IS FURTHER ORDERED, That the FCC Report 901 is hereby revised as set forth in this Order and Appendix C effective with the Report 901 for January 1985.

54. IT IS FURTHER ORDERED, That Docket No. 83-1347 is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendices B & C-may be seen in the FCC Dockets Branch, 1919 M Street, N.W., Wash, D.C.

Appendix A

Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies is amended to add the following accounts:

1. §31.5-53 Operating revenue accounts to be maintained. (Class A and B companies)

* * * * *

ACCESS REVENUES

508	Interstate access revenues
508.1	End user revenues
508.2	Carrier's carrier facilities revenues
508.3	Special access revenues
509	Intrastate access revenues

* * * * *

MISCELLANEOUS REVENUES

527	Interstate billing and collection revenues
528	Intrastate billing and collection revenues

* * * * *

2. §31.508 Interstate access revenues.

(a) This account shall include all federally tariffed charges assessed by exchange carriers upon interexchange carriers and end users for access to the local exchange network for interstate or international telecommunications.

(b) This account shall be further subdivided into the following three (3) subaccounts: 508.1 End user revenues, 508.2 Carrier's carrier facilities revenues, and 508.3 Special access revenues.

3. §31.508.1 End user revenues.

This subaccount shall contain the monthly flat rate charge assessed upon end users for each residential or business line as established by the Commission.

4. §31.508.2 Carrier's carrier facilities revenues.

This subaccount shall consist of federally tariffed charges assessed to interexchange carriers for access to local exchange facilities. The charges shall include:

(a) Limited Pay Telephone;

(b) Carrier Common Line;

(c) Line Termination;

(d) Local Switching;

(e) Intercept;

(f) Information;

(g) Common Transport; and

(h) Dedicated Transport.

Note: Carriers are required to maintain supporting documentation in such a manner as to be able to readily identify each element of the carrier's carrier facilities revenues.

5. §31.508.3 Special access revenues.

This subaccount shall include all tariffed charges assessed for other than end user or carrier's carrier access charges referred to in Sections 31.508.1 and 31.508.2 above.

6. §31.509 Intrastate access revenue.

This account shall include all state tariffed charges assessed by local exchange carriers upon interexchange carriers and end users for access to the local exchange network for intrastate telecommunications.

7. §31.527 Interstate billing and collection revenue.

This account shall include revenues for federally tariffed charges by local exchange carriers to interexchange carriers or other exchange carriers for billing and/or collecting interstate and international revenues. The charges shall include the customer billing process, account collections, billing information services, account establishment and maintenance, and account investigation.

8. §31.528 Intrastate billing and collection revenue.

This account shall include revenues for state tariffed charges by local exchange carriers to interexchange carriers or other exchange carriers for billing and/or collecting intrastate revenues. The charges shall include the customer billing process, account collections, billing information services, account establishment and maintenance, and account investigation.

9. §31.6-65 Operating expense accounts to be maintained.

COMMERCIAL EXPENSES

646 Interstate billing and collection expenses.

647 Intrastate billing and collection expenses.

ACCESS EXPENSES

657 Interstate carrier's carrier expenses.

658 Intrastate carrier's carrier expenses.

10. §31.646 Interstate billing and collection expenses.

This account shall include the expenses incurred by interexchange carriers or other exchange carriers for another local exchange carrier billing and collection services related to interstate domestic and international telecommunications services.

11. §31.647 Intrastate billing and collection expenses.

This account shall include the expenses incurred by interexchange carriers or other exchange carriers for another local exchange carrier billing and collection services related to intrastate telecommunications services.

12. §31.657 Interstate carrier's carrier expenses.

This account shall include the federally tariffed access expenses incurred by the interexchange carriers for access to the local exchange carriers' facilities.

Note: Carriers are required to maintain supporting documentation in such a manner as to be able to readily identify each tariffed element of this expense.

13. §31.658 Intrastate carrier's carrier expenses.

This account shall include the state tariffed access expenses incurred by the interexchange carriers for access to the local exchange carrier's facilities.

Alaska, AM Protection Standards
Alaska, Class I-N Stations
Alaska, Skywave Propagation
AM Station, Class III, Regional
Interference, Standards of Protection
Skywave Transmission

Class I-N AM stations established in Alaska with increased interference protection; high latitude skywave propagation curves adopted for use in Alaska.
—*AM Stations In Alaska*
MM Docket No. 83-807

FCC 84-489

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Protection Standards for AM Stations in Alaska	MM Docket No. 83-807 RM-4327

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 17, 1984; Released: October 25, 1984

BY THE COMMISSION:

Introduction

1. The Commission has before it for consideration its *Notice of Proposed Rule Making* pertaining to greater interference protection to certain AM stations in Alaska. The *Notice* was issued in response to a petition for rule making filed by the Alaska Broadcasters Association[1] in which it argued that increased skywave protection for these stations was necessary in order to ensure effective AM coverage in Alaska. To do this, the petition urged the Commission to accord Class I status to a group of

[1] The Alaska Public Broadcasting Commission joined in the filing of the petition.

16 Alaskan AM stations[2] which operate on United States Class I-A or I-B clear channels.[3]

2. In issuing the *Notice of Proposed Rule Making*, the Commission noted that Alaska is characterized by vast distances with relatively few major population centers. Because much of Alaska consists of scattered settlements far removed from the larger population centers, the people living in such places are beyond the reach of FM or TV stations and can only obtain service from distant AM stations which are relied on to provide weather and other vital information. In fact, some stations devote a significant part of each hour's broadcast to such material. However, it is important to note that because of the distances involved, much of Alaska must rely on very weak AM signal levels, often on the order of 0.1 mV/m. Although a signal level of 0.5 mV/m ordinarily is accepted as being necessary to provide satisfactory reception in rural areas, the petitioners argued that atmospheric and man-made noise are notably lower in Alaska so that signal levels well below 0.5 mV/m can provide adequate reception. In fact, we are told that this difference itself is sufficient to permit a 0.1 mV/m signal to provide service in Alaska equivalent to a 0.5 mV/m signal in the lower 48 states. However, as the petition pointed out, reliance on such signals presumes that they are not subjected to interference from other AM stations. Thus, the goal of the petition was to provide protection to the signals of these Alaskan stations so that the residents in remote communities could continue to receive the service provided by the existing signal levels. Petitioners sought to accomplish this through affording Class I protection to this group of stations.

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[2] The stations listed in the petition are as follows:

Public	*Commercial/Religious*
KDLG Dillingham, 670 kHz	KYAK Anchorage, 650 kHz
KBRW Barrow, 680 kHz	KBYR Anchorage, 700 kHz
KOTZ Kotzebue, 720 kHz	KFQD Anchorage, 750 kHz
KSDP Sand Point, 840 kHz	KTNX Anchorage, 1080 kHz
KSKO McGrath, 870 kHz	KFAR Fairbanks, 660 kHz
	KCBF Fairbanks, 820 kHz
	KJNP North Pole, 1170 kHz
	KABN Long Island, 830 kHz
	KNOM Nome, 780 kHz
	KICY Nome, 850 kHz
	KGGN Valdez, 770 kHz

[3] Although the petition had not been entirely clear on this point, the Commission treated it as seeking the same protection as is afforded Class I-A or I-B stations. This would mean protecting the 0.5 mV/m 50% skywave contour during nighttime hours. However, the *Notice* did not propose to alter the obligation of these stations to continue to provide skywave protection to the existing Class I stations operating on these channels in the lower 48 states.

3. The petition also dealt with several related technical matters that were included in the *Notice*. It noted the difference in signal propagation in higher (i.e., more northerly) latitudes and sought the use of Figure 2 of Section 73.190 of the Commission's rules when calculating interference caused by the proposed Alaskan clear channel operations. Also, on the matter of antenna efficiency, it urged the Commission to allow a minimum field strength of 175 mV/m at one kilowatt rather than the 225 mV/m usually required for Class I stations. Finally, it sought exemption from the minimum power requirements applicable to such clear channel operations. In issuing the *Notice* the Commission agreed that it was appropriate to explore ways of responding to the unique needs of the State of Alaska through increased interference protection. Comments were invited on this matter and on the related technical issues raised in the petition.

4. Comments and replies were filed by several broadcast industry groups and extensive filings were received from Alaska broadcast organizations and licensees and affected individuals and groups living in outlying areas of Alaska. Although the perspectives of the groups did not always coincide, there was little disagreement among them on the major issues. All agreed that the needs of Alaska were unique and that special consideration needed to be given to those needs. Likewise there was essential agreement that enhanced protection to various Alaskan stations was an appropriate mechanism for responding to these needs. The National Association of Broadcasters supported the proposals, and the Clear Channel Broadcasting Service ("CCBS"), an organization representing clear channel broadcasters in the lower 48 states, offered comments on what it thought should be required of these stations in exchange for this increased interference protection. CCBS also offered suggestions on the standards of protection which were in essential accord with those filed by the Alaskan petitioners in their comments.

Discussion

5. *Introduction* Since the needs of Alaska have been amply documented and the value of enhanced interference protection has been equally well established, the only points requiring extended discussion are those involving the level of protection to be afforded and the technical standards which should be applied to the new category of stations in Alaska. They are to be designated as Class I-N stations and a new Figure 1b to Section 73.190 will be used for high latitude skywave signal calculations.

6. The proposal to reclassify these Alaskan stations rests on the fact that Class I stations receive greater interference protection both daytime and nighttime. However, this greater protection is premised on the ability of these stations to provide wide area service. That, in turn, is the product of high transmitting power and the use of a highly efficient antenna.

Lower power or reduced antenna efficiency limit a station's ability to provide wide area service daytime and could make it impossible to generate a significant skywave signal at night. Use of a high latitude curve could only exacerbate this situation as it would show an even lower level of skywave signal propagation. Because of this situation, it is not possible to develop protection standards for Alaska without giving full attention to these matters and their interrelationships.

7. *Antenna Efficiency* The *Notice* proposed using the minimum antenna efficiency of 225 mV/m which is normally applied to Class I stations, a step which would require many of the subject stations to construct new, taller towers. Almost all of the comments oppose such a requirement, contending it would impose undue burdens. Although CCBS did support the proposed minimum antenna efficiency of 225 mV/m, it recognized the problems involved and urged a flexible waiver policy in those cases where it can be shown that it is not possible to reach this level of antenna efficiency. From the information contained in the Alaskan filings, it is clear that such problems exist in most if not all of these cases. This material documents the great burden that would be imposed if we insisted on an efficiency of 225 mV/m. For many stations, FAA flight path limitations preclude the construction of taller towers. Likewise, the permafrost conditions in Alaska pose construction problems which could preclude construction of a taller antenna. Even for those able to construct, that construction often would have to be at a substantial distance from the station. In most cases, the stations already have constructed the most efficient antenna array possible under the circumstances. Since the record already contains a sufficient showing on which to base waiver in such cases, there is no point in imposing a requirement which would be waived in most instances. Overall, the record has demonstrated that these stations already employ antennas as efficient as their circumstances permit and therefore that no additional requirement should be imposed.

8. *Minimum Power* The next issue is the power to be used by these stations. Class I stations are required to operate with at least 10 kW, and most of the affected stations meet or exceed this requirement. The proposal to require at least 10 kW power was premised on the fact that Class I stations are designed to provide service to an extended area for which at least 10 kW was thought to be necessary. Additional power would enable these stations to serve even larger areas, but that was not proposed because of the difficulties such a requirement would pose. Although some, like CCBS, seem to suggest use of a 50 kW minimum combined with a waiver procedure, the principal thrust of the other filings is in terms of the difficulties faced in operating with high power. The costs of electricity are much higher in Alaska (in one example the best rate offered is 28.5¢ per kWh, a rate far higher than those charged in the lower

48 states) and can account for a substantial portion of a station's budget. In one case, electric power for a 5 kW operation now takes 10% of the station's total budget, a cost which would double if the station went to 10 kW and would increase proportionately more if greater power were required.

9. Although there is some support for not requiring a minimum power level, the Alaskan petitioners themselves do agree that the 10 kW figure is a reasonable one and that compliance with it can be achieved if some grace period is provided for the few stations in the group that now operate below this level.[4] Of the three stations in the original group which would be affected by imposition of a 10 kW minimum, one already has plans underway to increase its power to 10 kW, and petitioners hope that the other two could be increased to 10 kW within five years. No specific commitment, however, has been made to do so.

10. Although higher power would enable a station to better serve the needs of the citizens of Alaska, the matter is not one which can be resolved without giving full consideration to the practical problems such a requirement would impose. Apparently, all the stations that can feasibly increase beyond the 10 kW level already have done so, and placing such an obligation on the others would impose an onerous burden, perhaps one that could not even be met. At the same time, it does have to be recognized that at least some minimum power is necessary if these stations are to provide the service on which increased protection is premised. The *Notice* suggested 10 kW and the record supports the use of such a minimum. However, it does appear necessary to provide a grace period in which to achieve this power level. The five year period suggested by petitioners for stations not now using 10 kW seems appropriate. To protect the ability of these stations to achieve this power increase, it will be necessary to provide additional interference protection keyed to the prospective 10 kW operation. Thus, during the grace period, calculations involving these stations should be based on present facilities but with an assumed power of 10 kW. Once a station has increased power, calculations are to be based on its actual facilities. If the station does not increase power to at least 10 kW operation within five years, it will cease to be afforded protection as a Class I station and again will be treated as a Class II station. The *Notice* also sought comment on whether to provide enhanced interference protection to other stations operating on U.S. Clear Channels which were

[4] The 10 kW level is reached or exceeded by 11 of the 16 stations in the original group. According to petitioner, two others, KGGN Valdez and KSDP Sand Point are to be deleted from this group. Thus, only three: KOTZ Kotzebue, KSKO McGrath and KLDG Dillingham, all at 5 kW, remain below the 10kW level. Also, another station (KBBI, Homer) has asked to be added to this group, and it also would need to increase power from 5 kW to 10 kW.

not included in the original group. Based on the record it is clear that important benefits to Alaska's residents could flow from treating other stations in a like fashion. Existing coverage would be better protected. Also this would act as a spur to stations to increase power to 10 kW in order to get the increased protection. Therefore, we have decided to allow other stations operating on U.S. Clear Channels to become Class I stations by meeting the same requirements as the original group. So far, only station KBBI in Homer has asked to be included. However, it operates with less than 10 kW power, so an increase to that level would be necessary. It will be included in the original group which will have the benefit of the five-year grace period. Other stations also can be added later upon reaching the 10 kW power level.

11. *High Latitude Curves* As matters now stand, Figure 1a of Section 73.190 of the Commission's rules ordinarily is used to calculate both service and interference skywave contours for stations on clear channels, including those in Alaska. However, because Figure 1a does not reflect propagation conditions at higher latitudes, Alaskan stations have been permitted to seek waiver to permit the use of Figure 2 which does take the effect of latitude into account, a practice generally opposed by Class I stations. The *Notice* proposed a new 50% high latitude curve which would be used to determine the extent of skywave service and it proposed that values for field strength 10% of the time would be derived by increasing the 50% values by 8 dB.

12. All of the commenting parties agree that recognition should be given to high magnetic latitude effects in determining both service and interference skywave signal levels.[5] Although the parties recognize that precise depiction of high latitude effects will have to await completion of the ongoing studies in Alaska,[6] they concur in the appropriateness of adoption of an interim curve in the meantime. No question was raised about the 50% curve, but some parties thought that a different factor should be employed for deriving 10% field strength values. Instead of 8 dB, CCBS asserts that the precise difference between 50% and 10% field strength values at higher latitudes is 12.95 dB and argues for the use of this instead of the 8 dB as proposed. The Alaska Broadcasters Association agrees but suggests the use of the rounded-off correction factor of 13 dB. As the *Notice* indicated, the 8 dB figure was a tentative one. Based on the engineering showings in the record we will adopt new 50% and 10%

[5] The effect in both is to show that given signal levels do not extend as far as they would at lower latitudes, thereby showing a reduced area of service and a lessened potential for interference.

[6] These studies are part of a cooperative research project with the University of Alaska. It is designed to cover at least half of an 11 year sunspot cycle from the point of highest activity to the lowest.

skywave propagation curves reflecting a factor of 13 dB.[7] Also, the Commission's staff has refined the high latitude curves to improve their applicability to short paths (i.e., in Alaska). However, the refinement has virtually no effect on long paths from Alaska to the lower 48 states. From now on, the formulas from which these curves are derived are to be used for all skywave calculations involving one or more Alaskan AM stations regardless of class.[8] Thus, in doing single signal computations, the formula in Figure 1b is to be used to calculate the 10% values for both stations. In doing RSS calculations, Figure 1b is to be used in computing the RSS of a station in Alaska. For stations not in Alaska Figure 1b is to be used for computing the contributions from stations in Alaska.

13. *Level of Protection* Finally, we come to the issue of how best to protect the ability of these Alaskan stations to reach the people who depend on their service. The normally protected contours for Class I stations are the 0.1 mV/m groundwave contour daytime (0.5 mV/m groundwave contour nighttime) and the 0.5 mV/m 50% skywave contour nighttime. Although protecting the 0.1 mV/m groundwave contour will serve the function of ensuring the continuation of needed groundwave service, there are several problems with specifying protection to the normal skywave service contour. With the less efficient and lower powered operations involved here, especially using the high latitude curves, some of these stations will not even generate a 0.5 mV/m 50% skywave contour. If there is no skywave contour to protect, the commenting parties suggest protecting the 0.1 mV/m groundwave contour, but this by itself falls short of serving the vital needs of Alaska.

14. As we observed in the *Notice*, petitioners asserted that the lower noise levels in Alaska permit reception of low signal levels on the order of 0.1 mV/m or less which is subjectively equivalent to a 0.5 mV/m signal in the lower 48 states. The filings in this proceeding have documented this assertion. Not only can such lesser signals be received, they are depended on to provide weather bulletins and other vital information. In one case, a measured signal level of 0.072 mV/m was shown to provide fully satisfactory service. Unless some method is found for taking this into account, there will be no way to protect nighttime service for those living outside the 0.1 mV/m groundwave contour. Since in parts of Alaska night can last 24 hours in winter, this means the possibility of losing the only signal capable of providing warnings of severe weather. We will,

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[7] The effect of this change is to show that the interfering 10% contour would extend further than if a 8 dB correction had been employed. This would lead to more effective protection for the skywave service of these Alaskan stations.

[8] However, it is not necessary to calculate signal levels from Hawaii to Alaska or vice versa as the great distance involved precludes the possibility of interference. For the same reason it has not been necessary to calculate signal levels to or from Hawaii and the lower 48 states.

therefore, adopt rules that will require that 0.1 mV/m 50% skywave contour to be protected.[9] In azimuths where the station does not develop a 0.1 mV/m 50% skywave signal, protection will be given to the 0.1 mV/m groundwave contour on an RSS basis. Even with the new curves, an efficiency of only 175 mV/m and a power of 10 kW would be sufficient to generate such a signal level which in Alaska has been shown to be sufficient for satisfactory reception.

15. Affording protection of the 0.1 mV/m 50% skywave contour in Alaska would establish a standard which is different from the one which is specified in the lower 48 states.[10] However, this level of protection is fully supported by the record and is quite consistent with the unique situation affecting Alaska. It recognizes both the need to rely on lower signal levels and the fact that at higher latitudes it is possible to do so. That being the case, we believe it appropriate to give full recognition to Alaska's special needs.[11] Likewise, although expanded skywave protection could have a preclusive effect, this is not a problem as Alaska would continue to have abundant opportunity to obtain new AM stations even with these greater limitations on establishing co-channel operations on these frequencies.

16. As indicated in the *Notice of Proposed Rule Making*, it appears appropriate to apply the new rules to applications filed during the pendency of this proceeding. In the event of a conflict, the applicant will be given a reasonable opportunity to amend the application as required.

17. Accordingly, IT IS ORDERED That Sections 73.22, 73.24, 73.25, 73.182, 73.185, 73.187, 73.189 and 73.190 ARE AMENDED effective, December 3, 1984, as set forth in the attached appendix.

18. Authority for this action is contained in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

Regulatory Flexibility Analysis

I. *Need for and purpose of the rule.*

The rule is designed to provide additional interference protection for AM stations in Alaska. Providing such protection helps assure the ability of these stations to reach outlying communities in Alaska which depend on the signals of these stations for weather warnings and other important information.

II. *Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues raised.*

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[9] Such skywave protection has been shown to be needed at night, but because of the different propagation conditions in Alaska, daytime skywave protection is not required.

[10] However, there is no difference in the level of adjacent channel protection being afforded.

[11] Doing so includes providing the same level of protection from stations conducting pre-sunrise and post-sunset operations as is afforded other Class I stations.

As discussed in the body of the *Report and Order*, concern was expressed about the burden which would be imposed if these stations had to operate with improved antenna efficiency and high power in order to be eligible for the additional interference protection. The issue of antenna efficiency was the principal concern because of the problems involved in trying to build the taller towers required for greater antenna efficiency. Although some comment was directed to the issue of minimum power, there was general agreement about the appropriateness of the level proposed provided there was a grace period in which to achieve compliance.

B. *Assessment.*

The comments offered persuasive arguments against adopting the minimum antenna efficiency requirement which had been proposed. For many stations, construction of taller towers would be an impossibility. Even for those stations which could construct such towers, the burden in doing so would be excessive. As to the issue of requiring a minimum power, a grace period seems appropriate for those few stations not now at or above this level.

C. *Changes made as a result.*

Based on the record developed, the Commission has decided not to adopt the antenna efficiency requirement of 225 mV/m which had been proposed but to apply a lesser requirement of 175 mV/m instead. Also, in adopting the minimum power requirement, the Commission will allow the five-year grace period suggested by the petitioner.

III. *Significant alternative considered and rejected.*

The only alternative would have been to impose no power minimum, but without the level of power proposed and adopted, these stations would be unable to render the service for which they sought and received protection.

19. IT IS FURTHER ORDERED That this proceeding is terminated.

20. For further information concerning this proceeding, contact Jonathan David, Mass Media Bureau, (202) 632-7792 or Wilson La Follette, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

1. 47 CFR 73.22 is amended by revising paragraph (d)(1) to read as follows:

§73.22 Assignment of Class II-A stations.

* * * * *

(d)

(1) Protection by Class II-A stations to other stations. The co-channel Class I-A station shall be protected by the Class II-A station to its 0.1 mV/m contour daytime and its 0.5 mV/m 50 percent skywave contour nighttime. A co-channel Class I-N station shall be protected to its 0.1 mV/m contour daytime and its 0.1 mV/m 50% skywave contour nighttime. The 0.1 mV/m groundwave contour of a Class I-N station is to be protected in those azimuths in which the Class I-N station does not develop a 0.1 mV/m 50% skywave signal. All other stations of any class authorized on or before October 30, 1961, shall normally receive protection from objectionable interference from Class II-A stations as provided in §73.182.

* * * * *

2. 47 CFR 73.24 is amended by revising paragraph (h) to read as follows:

§73.24 Broadcast facilities; showing required.

* * * * *

(h) That, in the case of an applications for a Class II station, the proposed station would radiate, during two hours following local sunrise and two hours preceding local sunset, in any direction toward the 0.1 mV/m groundwave contour of a co-channel United States Class I-A or I-B station, no more than the maximum radiation values permitted under the provisions of §73.187.

* * * * *

3. 47 CFR 73.25 is amended by revising paragraph (a) to read as follows:

§73.25 Clear Channels: Classes I and II stations.

* * * * *

(a) On each of the following channels, one Class I-A station will be assigned, operating with power of 50 kW: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1030, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kHz. In Alaska, these frequencies can be used by Class I-N stations subject to the conditions set forth in Section 73.182(a)(i)(iii). In addition, on the channels listed in this paragraph, Class II stations may be assigned as follows:

* * * * *

4. 47 CFR 73.182 is amended by revising paragraphs (a)(1), (a)(1)(ii), and (a)(2); by adding new paragraph (a)(1)(iii) and a Note thereto; by revising paragraphs (i), (r), (s) and (t) and by revising the chart in paragraph (v) to read as follows:

§73.182 Engineering standards of allocation.

(a) * * *

(1) Class I stations are dominant stations operating on clear channels with powers of not less than 10 or more than 50 kW. These stations are designed to render primary and secondary service over an extended area and at relatively long distances, hence have their primary service areas free from objectionable interference from other stations on the same and adjacent channels and secondary service areas free from objectionable interference from stations on the same channels. (The secondary service area of a Class I station is not protected from adjacent channel interference. However, if it is desired to make a determination of the area in which adjacent channel groundwave interference (10 kHz removed) to skywave service exists, it may be considered as the area where the ratio of the desired 50% skywave of the Class I station to the undesired groundwave of a station 10 kc/s removed is 1 to 4.) From an engineering point of view, Class I stations may be divided into three groups and, hereafter, for the purpose of convenience, the three groups of Class I stations will be termed Class I-A, I-B or I-N in accordance with the assignment to channels allocated by §73.25 (a) or (b).

* * * * *

(ii) The Class I stations in group I-B are those assigned to the channels allocated by §73.25(b), on which duplicate operation is permitted, that is, other Class I or Class II stations operating unlimited time may be assigned to such channels. During nighttime hours of operation a Class I-N station is protected to the 100 uV/m 50 percent skywave contour and a Class I-B station of this group is protected to the 500

uV/m 50 percent skywave contour. During daytime hours of operation Class I-B and Class I-N stations are protected to the 100 uV/m groundwave contour from stations on the same channel. Protection is given to the 500 uV/m groundwave contour from stations on adjacent channels for both day and nighttime operation. The operating powers of Class I stations on these frequencies shall be not less than 10 kW nor more than 50 kW.

(iii) In Alaska there is a third group of Class I stations, designated as Class I-N. These stations operate on the channels allocated by Section 73.25(a) or Section 73.25(b) with a minimum power of 10 kW and antenna efficiency of 175 mV/m for 1 kW. Stations operating on these channels in Alaska which have not been designated as Class I-N stations in response to licensee request will continue to be considered as Class II stations. During daytime hours a Class I-N station receives protection to the 100 uV/m groundwave contour from co-channel stations. During nighttime hours a Class I-N station receives protection to the 100 uV/m 50% skywave contour from co-channel stations. Protection is given to the 500 uV/m groundwave contour from stations on adjacent channels for both day and nighttime operation.

Note: In the Report and Order in MM Docket No. 83-807, the Commission designated 15 stations operating on U.S. clear channels as Class I-N stations. Eleven of these stations already have Class I-N facilities and are to be protected accordingly. Permanent designation of the other four stations as Class I-N is conditioned on their constructing minimum Class I-N facilities no later than December 31, 1989. During this period, until such facilities are obtained, temporary designation as Class I-N stations shall be applied, and calculations involving these stations should be based on existing facilities but with an assumed power of 10 kW. Thereafter, these stations are to be protected based on their actual Class I-N facilities. If any of these stations does not obtain Class I-N facilities in the period specified, it is to be protected as a Class II station based on its actual facilities. These four stations may increase power to 10 kW without regard to the impact on Class II co-channel stations. However, increases by these stations beyond 10 kW (or by existing Class I-N stations beyond their current power level) are subject to applicable protection requirements for co-channel Class II stations. Other stations not on the original list but which meet applicable requirements may obtain Class I-N status by seeking such designation from the Commission. If a power increase or other change in facilities by a station not on the original list is required to obtain minimum Class I-N facilities, any such application shall meet the interference protection requirements applicable to a Class II proposal on the channel.

(2) Class II stations are secondary to stations which operate on clear channels with powers not less than 250 watts nor more than 50 kW, except that Class II-A stations shall not operate nighttime with less than 10 kW, and Class II-B stations coming within §73.21(a)(2)(ii)(C) shall not operate with nighttime power exceeding 1 kW. Class II stations are required to use directional antennas or other means to avoid causing interference within the normally protected service areas of Class I stations or other Class II stations. (For special rules concerning Class II-A stations, see §73.22.) These stations normally render primary service only, the area of which depends on the geographical location, power, and frequency. This may be relatively large but is limited by and subject to such interference as may be received from Class I stations. However, it is recommended that Class II stations be so located that the interference received from other stations will not limit the service area to greater than 2.5 mV/m groundwave contour nighttime and 0.5 mV/m groundwave contour

daytime, which are the values for the mutual protection of this class of stations with other stations of the same class. There are three exceptions:

(i) Class II-A stations are normally protected at night to the limit imposed by the co-channel Class I-A or Class I-N station;

(ii) Class II-B stations coming within §73.21(a)(2)(ii)(D) are normally protected at night to the limit imposed by the co-channel Class I-A or Class I-N station or the higher limit, if any, imposed by previously authorized facilities of other stations; and

(iii) Class II-B stations coming within §73.21(a)(2)(ii)(C) are normally protected at nighttime to their 10 mV/m groundwave contour, or the higher limit, if any, imposed by previously authorized facilities of other stations.

* * * * *

(i) Secondary service is delivered in the areas where the skywave for 50% or more of the time has a field strength of 0.5 mV/m or greater (0.1 mV/m in Alaska). It is not considered that satisfactory secondary service can be rendered to cities unless the skywave approaches in value the groundwave required for primary service. The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. Class I stations only are assigned on the basis of rendering secondary service.

Note: * * *

* * * * *

(r) For the purpose of estimating the coverage and the interfering effects of stations in the absence of field strength measurements, use shall be made of Figure 8 of §73.190 which describes the estimated effective field for one kW power input of simple vertical omnidirectional antennas of various heights with ground systems of at least 120 one-quarter wavelength radials. Certain approximations, based on the curve or other appropriate theory, may be made when other than such antennas and ground systems are employed, but in any event the effective field to be employed shall not be less than given in the following:

Class of station	Effective field
I-A and I-B	225 mV/m
I-N	175 mV/m
II and III	175 mV/m
IV	150 mV/m

In case a directional antenna is employed, the interfering signal of a broadcasting station will vary in different directions, being greater than the above values in certain directions and less in others, depending upon the design and adjustment of the directional antenna system. To determine the interference in any direction the measured or calculated radiated field (unabsorbed field strength at 1 mile from the array) must be used in conjunction with the appropriate propagation curves. (See §73.185 for further discussion and solution of a typical directional antenna case.)

(s) The existence or absence of objectionable groundwave interference from stations on the same or adjacent channels shall be determined by actual measurements made according to the method described in §73.186, or, in the absence of such measurements, by reference to the propagation curves of §73.184. The existence or absence

of objectionable interference due to skywave propagation shall be determined by reference to the appropriate propagation curves in Figure 1a, 1b or Figure 2 of §73.190.

Note: * * *

(t) *Computation of Skywave Field Strength Values*: (1) *Fifty Percent Skywave Field Strength Values (Clear Channel)* In computing the fifty percent skywave field strength values of a Class I-A or I-B clear channel station, use shall be made of Figure 1a of §73.190 entitled "Skywave Signals for 10 percent and 50 percent of the time." In computing the fifty percent skywave field strength values of a Class I-N station (in Alaska), use shall be made of the formula for deriving such values included in Figure 1b of §73.190.

(2). *Ten Percent Skywave Field Strength Values (Clear Channel).* In computing the 10% skywave field strength for stations on clear channels on a single signal basis, the curve in Figure 1a should be used unless one or both of the stations being considered are in Alaska; in such a case, the formula included in Figure 1b should be used to calculate the 10% values for both stations. In computing the 10% skywave field strength for stations on clear channels on an RSS basis, this formula included in Figure 1b shall be used in computing the RSS of a station in Alaska. In computing the RSS of a station not in Alaska, the formula included in Figure 1b shall be used in computing the contribution from stations in Alaska, and the curve in Figure 1a shall be used in computing contributions from stations not in Alaska.

(3). *Regional and Local Channels.* In computing the 10% skywave field strength values for stations on a regional channel, on an RSS basis, the formula included in Figure 1b shall be used in computing the RSS of a station in Alaska. In computing the RSS of a station not in Alaska, the formula included in Figure 1b shall be used in computing the contribution from stations in Alaska, and the curve in Figure 2 shall be used in computing contributions from stations not in Alaska. (In the case of Class IV stations on local channels, simplifying assumptions may be made. See Note paragraph (a) (4) of this section.)

(4). *Determination of Angles of Departure.* In calculating skywave field strength for stations on all channels, the pertinent vertical angle shall be determined by use of Figure 6a of §73.190, entitled "Angles of Departure vs. Transmission Range."

(5). *Calculations involving Hawaii.* In performing the calculations under (2) and (3) above, it is not necessary to consider the effect of stations in Hawaii on stations on the mainland (including Alaska) or vice versa, as the distances involved preclude the possibility of interference.

Note: * * *

* * * * *

(v) * * *

I-A * * *

I-B * * *

I-N	do	50 kW	SC 100 uV/m	SC 100 uV/m	5 uV/m	5 uV/m	AC 500 uV/m AC 500 uV/m

II-A * * *

* * * * *

5. 47 CFR 73.185 is amended by revising paragraphs (b), (c), (d), (e) and (f) to read as follows:

§73.185 Computation of interfering signal.

* * * * *

(b) For signals from stations operating on clear channels, skywave interference shall be determined from Figures 1a (or 1b) and 6a of §73.190.

(c) For signals from stations operating on regional and local channels, skywave interference is determined from Figures 2 and 6a of §73.190, unless one or both stations are in Alaska, in which case Figures 1b and 6a of §73.190 are employed. (Certain simplifying assumptions may be made in the case of Class IV stations on local channels. See Note to §73.182(a)(4).)

(d) Figure 6a of §73.190, entitled "Angles of Departure vs. Transmission Range" is to be used in determining the angles in the vertical pattern of the antenna of an interfering station to be considered as pertinent to transmission by one reflection. To provide for variation in the pertinent vertical angle due to variations of ionosphere height and ionosphere scattering, the curves 4 and 5 indicate the upper and lower angles within which the radiated field is to be considered. The maximum value of field strength occurring between these angles shall be used to determine the multiplying factor to apply to the 10 percent skywave field strength value read from Figure 1a, Figure 1b or Figure 2 of §73.190. The multiplying factor is found by dividing the maximum radiation between the pertinent angles by 100 mV/m. (Curves 2 and 3 are considered to represent the variation due to the variation of the effective height of the E-layer while Curves 4 and 5 extend the range of pertinent angles to include a factor which allows for scattering. The dotted lines are included for information only.)

(e) Example of the use of skywave curves for stations operating on clear channels: Assume a Class II station with which interference may be expected is located at a distance of 450 miles from a proposed Class II station. The critical angles of radiation as determined from Figure 6a of §73.190 are 9.6° and 16.3°. If the vertical pattern of the antenna of the proposed station, in the direction of the other station, is such that between the angles of 9.6° and 16.3° above the horizon the maximum radiation is 160 mV/m at 1 mile, the value of the 10 percent field, as read from Figure 1a of §73.190, is multiplied by 1.6 to determine the interfering field strength at the location in question. For calculations involving Class I-N stations Figure 1b is employed instead of Figure 1a.

(f) For stations operating on regional and local channels, interfering skywave field strengths shall be determined in accordance with the procedure specified in paragraph (d) of this section and illustrated in paragraph (e) of this section, except that Figure 2 of §73.190 is used in place of Figure 1a or 1b of §73.190. In using Figure 2 of §73.190, one additional parameter must be considered, i.e., the variation of received field with the latitude of the path.

* * * * *

6. 47 CFR 73.187 is amended by revising paragraph (a) to read as follows:

§73.187 Limitation on daytime radiation.

(a)(1) Except as otherwise provided in paragraphs (a)(2) and (3) of this section, no authorization will be granted for Class II facilities if the proposed facilities would radiate during the period of critical hours (the two hours after local sunrise and the two hours before local sunset) toward any point on the 0.1 mV/m contour of a co-channel U.S. Class I-A or I-B station, at or below the pertinent vertical angle determined from Curve 4 of Figure 6a of §73.190, values in excess of those obtained as provided in paragraph (b) of this section.

(2) The limitation set forth in paragraph (a)(1) of this section shall not apply in the following cases:

(i) Any Class II facilities authorized before November 30, 1959; or

(ii) For Class II stations authorized before November 30, 1959, subsequent changes of facilities which do not involve a change in frequency, an increase in radiation toward any point on the 0.1 mV/m contour of a co-channel U. S. Class I-A or I-B station, or the move of transmitter site materially closer to the 0.1 mV/m contour of such Class I-A or I-B station.

(3) If a Class II station authorized before November 30, 1959, is authorized to increase its daytime radiation in any direction toward the 0.1 mV/m contour of a co-channel Class I-A or I-B station (without a change in frequency or a move of transmitter site materially closer to such contour), it may not, during the two hours after local sunrise or the two hours before local sunset, radiate in such directions a value exceeding the higher of:

(i) The value radiated in such directions with facilities last authorized before November 30, 1959, or

(ii) The limitation specified in paragraph (a)(i) of this section.

* * * * *

7. 47 CFR 73.189 is amended by revising paragraph (b)(2)(iii) to read as follows:

§73.189 Minimum antenna heights or field strength requirements.

* * * * *

(b) * * *

* * * * *

(2) * * *

* * * * *

(iii) Class I-A and I-B stations, a minimum effective field strength of 225 mV/m for 1 kW, for Class I-N stations, a minimum effective field strength of 175 mV/m for kW.

* * * * *

8. 47 CFR 73.190 is amended by adding a new chart designated as figure 1b, and by revising the section text to read as follows:

§73.190 Engineering charts.

This section consists of the following figures: 1, 1a, 1b, 2, R3, 5, 6, 6a, 7, 8, 9, 10, 11, and 12.

Note: The charts as reproduced herein, due to their small scale, are not to be used in connection with material submitted to the FCC.

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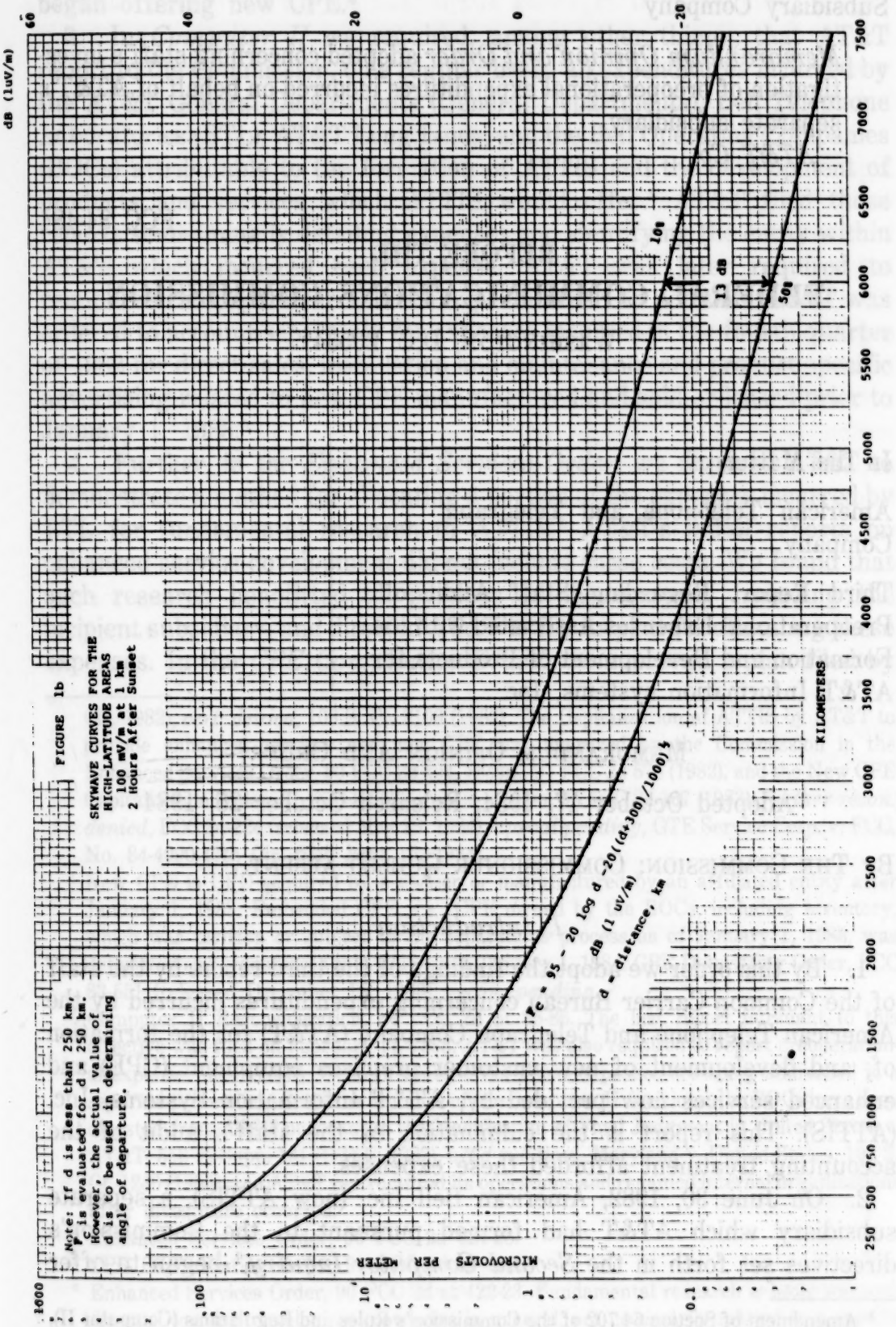
dB (1uV/m)
60
40
20
0
-20
1600
100
10
1
0.1
MICROVOLTS PER METER
7500
7000
6500
6000
5500
5000
4500
4000
3500
3000
2500
2000
1500
1000
750
500
250
KILOMETERS
10s
13 dB
50s
Ec = 95 - 20 log d -20((d+300)/1000) ϕ
dB (1 uV/m)
d = distance, km
FIGURE 1b
SKYWAVE CURVES FOR THE HIGH-LATITUDE AREAS
100 mV/m at 1 km
2 Hours After Sunset
Note: If d is less than 250 km, Ec is evaluated for d = 250 km. However, the actual value of d is to be used in determining angle of departure.

Common Carrier, Operating Expenses
Subsidiary Company

Memorandum Opinion and Order adopted concerning staff's investigation of preoperational expenditures incurred on behalf of AT&T's separate subsidiary.
—*AT&T Co.*

FCC 84-484

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

American Telephone and Telegraph Company

Third Report Regarding Staff Audit of Preoperational Expenses Associated with the Formation and Development of Products for AT&T Information systems, Inc.

MEMORANDUM OPINION AND ORDER

Adopted October 17, 1984; Released October 25, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. Introduction

1. By this order we adopt the findings of the third report by the staff of the Common Carrier Bureau concerning expenditures incurred by the American Telephone and Telegraph Company (AT&T) for the formation of, and development of new customer premises equipment (CPE) and enhanced services now provided by, AT&T Information Systems, Inc. (ATTIS). This report is the culmination of the staff's audit of the accounting treatment afforded these expenses.

2. On June 30, 1982, American Bell Inc. (now ATTIS), a separate subsidiary which AT&T had formed pursuant to the Commission's directives set forth in the *Second Computer Inquiry*,[1] began to offer

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1981), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C.

enhanced services to the public. Subsequently, on January 1, 1983, ATTIS began offering new CPE.[2]

3. In *Computer II* we required, among other things, that AT&T report to the Commission, on a regular basis, all expenditures incurred by the AT&T General Departments (General Departments), Bell Telephone Laboratories (BTL), AT&T Long Lines, and the Bell Operating Companies (BOCs) attributable to the formation of ATTIS and the development of products and services which ATTIS would offer.[3] AT&T filed these reports semi-annually detailing expenses and identifying the entity within AT&T which incurred each expense. AT&T was later required to reimburse ratepayers for all such expenditures.[4] In addition, AT&T was ordered to account separately for expenses incurred in the fourth quarter of 1982 for direct sales, installation and maintenance and product specific advertising related to new CPE manufactured and sold or leased prior to January 1, 1983.[5]

4. Further, in the *Enhanced Services Order*, we required AT&T to demonstrate a method for allocating a portion of the expenses incurred by BTL for fundamental research to ATTIS.[6] AT&T's initial reports on enhanced service development did not include these costs. We found that such research benefitted all portions of the company including the incipient subsidiary, and directed AT&T to file its plan for allocating these expenses. In the *CPE Compliance Order*[7] we approved a plan filed by

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Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983). The Capitalization of ATTIS by AT&T to provide enhanced services and new CPE was approved by the Commission in the Enhanced Services Order, 90 FCC 2d 404, *recon.*, 91 FCC 2d 578 (1982), and the New CPE Capitalization Order, 91 FCC 2d 578, *recon. denied*, 95 FCC 2d 167 (1983), *further recon. denied*, FCC 84-224 (released May 23, 1984), *appeal pending*, GTE Service Corp. v. FCC, No. 84-4090 (7th Cir. filed June 15, 1984).

[2] New CPE is CPE acquired by a carrier or manufactured by an affiliated entity after January 1, 1983. Embedded CPE, *i.e.*, CPE owned by the BOCs, including inventory, which was tariffed or subject to the separations process as of January 1, 1983, was detariffed and transferred to ATTIS as of January 1, 1984. CPE Detariffing Order, FCC 83-551 (released December 15, 1983), *recon. pending*.

[3] Computer II Reconsideration, 84 FCC 2d at 85-86. The last report pursuant to this directive was filed on February 14, 1983. AT&T was also required to report preoperational expenses incurred by Western Electric Co. Those expenses are being addressed in a separate proceeding. Since the issuance of the Computer II decisions, the BOCs have been divested from AT&T pursuant to the Modification of Final Judgment in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983), and AT&T restructured its operations and renamed internal organizations after divestiture occurred.

[4] Enhanced Services Order, 90 FCC 2d 424-28.

[5] CPE Capitalization Order, 91 FCC 2d at 598.

[6] Enhanced Services Order, 90 FCC 2d at 422-23. Fundamental research is basic research directed towards developing knowledge in general, not necessarily related to a specific product or service. *Id.*

[7] CPE Compliance Order, 93 FCC 2d 599 (1983).

AT&T to include a portion of BTL's fundamental research expenses among preoperational expenses attributable to ATTIS on the basis of billings from BTL for non-fundamental research and systems engineering work.[8] Preoperational fundamental research expenses are reimbursable to ratepayers.

5. The staff's first report on preoperational expenses, attached to the *Enhanced Services Order* as Appendix D, described AT&T's methods of accounting for expenses incurred by various organizations within AT&T to enable ATTIS to offer enhanced services and reporting those expenses to the Commission. The second report, attached as Appendix B to the *CPE Compliance Order*, identified more than $18 million in preoperational expenses incurred by AT&T, the BOCs and BTL which had not been reported.

6. The staff's report, attached hereto as an appendix, describes the methodology and findings from the audit of AT&T preoperational expenses concerning matters which had not been completed prior to the issuance of earlier reports. The current report describes: the staff's final review of expenses reported by AT&T and the BOCs to the Commission and the overhead amounts loaded onto those expenses; its review of AT&T and BOC procedures for identifying and reporting expenses for the fourth quarter of 1982 related to new CPE; the review of expenses incurred by AT&T's real estate subsidiary, 195 Broadway Corp., in providing facilities and other services for employees engaged in activities benefitting ATTIS; and the staff's review of the reconciliation of billing by AT&T under the former License Contract agreement to verify that preoperational expenditures of regulated affiliates have been reimbursed to those affiliates. It also addresses AT&T's compliance with Commission preoperational accounting orders issued subsequent to the two earlier staff reports and describes activities of AT&T which the staff found to be relevant to the overall effort to establish ATTIS.

7. In addition to amounts identified in the staff's previous reports, the staff has identified $29.2 million in expenditures which should have been classified as preoperational expenses.[9] AT&T has subsequently recognized that these expenses were properly attributable to the formation of ATTIS or related activities. These findings, the basis for which is

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[8] *Id.* at 603-05. We affirmed the use of that method of allocation for pre-divestiture fundamental research in Allocation of Fundamental Research Expenses, ENF 83-14, FCC 83-600 (released January 13, 1984).

[9] The $29.2 million does not include a possible increase in the amount reportable as preoperational expenses. The staff of the Common Carrier Bureau and AT&T differ by approximately $1.2 million over the total amount of overhead assignable to rent and house services provided by 195 Broadway Corp. which should be attributable to ATTIS. We hereby delegate to the Bureau the authority to resolve this matter in accordance with this and our previous orders.

explained in the report, are summarized as follows:

Completion of Prior Audit Tasks	*$ (in Millions)*
License Contract Budget Decision Packages (BDPs) judged reportable[10]	5.7
Non-License Contract BDPs omitted	6.0
Business Services Dept.-Moving Expense (1981 & 1982)	2.4
Marketing Depts.-Administrative Loadings	3.5
Sub-Total	17.6
Final Audit Phase	
Overhead Rate Adjustments	
1) Relief and Pensions	2.0
2) Paid Absence	1.3
3) General Expense	1.4
4) Supervision	1.3
BOC Rent & House Service Loadings	4.4
Business CPE-Communications	1.0
Fourth Quarter 1982-Advertising	.2
Total Findings-Phase III	11.6
	29.2

In addition, AT&T proposes to allocate the amount of $64.7 million for fundamental research performed by BTL attributable to products and services sold by ATTIS. AT&T has represented that it would reimburse to Long Lines and the divested BOCs amounts related to preoperational fundamental research expenses on August 31, 1984. The total amount reimbursed for preoperational fundamental research including interest will be approximately $90 million.[11]

8. Accordingly the audit of the preoperational expenses is terminated except as may be necessary to resolve any uncompleted matters. As we emphasized in our *CPE Compliance Order*, this does not end our responsibility to oversee the manner in which ATTIS interacts with AT&T affiliates. 93 FCC 2d at 607. We direct the staff to verify that the amount allocated by AT&T to ATTIS for fundamental research by BTL is consistent with Commission directives in the *Fundamental Research Order*.

[10] The Budget Decision Package was the functional statement to which the AT&T General Departments assigned all expenses incurred in achieving a single organizational result or purpose.

[11] The total amount reported in AT&T's reports on preoperational expenses, including adjustments made due to the review by the Commission's staff and AT&T's own audits, was $1,177,622,000.

III. Ordering Clauses

9. Accordingly, IT IS ORDERED, That the American Telephone and Telegraph Company SHALL COMPLY with the determinations set forth in the Appendix attached to this Order.

10. IT IS FURTHER ORDERED That the Chief, Common Carrier Bureau shall report to the Commission concerning the matters unresolved by this Order.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

FINAL REPORT ON AT&T CUSTOMER PREMISES EQUIPMENT AND ENHANCED SERVICES PREOPERATIONAL EXPENSES

I. *Introduction*

1. This report summarizes the final phase of the staff's investigation of the development and formation expenditures incurred by AT&T in establishing its separate subsidiary, AT&T-Information Systems (ATTIS, formerly American Bell Inc.), which since June 30, 1982 has marketed enhanced services and since January 1, 1983 has marketed customer premises equipment (CPE). These start-up costs were incurred primarily during the 1981 to 1982 time period prior to ATTIS' start of operations. This investigation was conducted to ensure that expenditures on behalf of ATTIS were borne by AT&T shareholders, not by ratepayers. *Enhanced Services Order*, 90 FCC 2d 404, 420 (1982).

A. Prior Reports

2. This is the third staff report concerning the expenses incurred in developing products for and forming ATTIS. The Commission has adopted two earlier reports in conjunction with the Commission's approval of AT&T's plans to offer enhanced services and CPE through a subsidiary separate from its regulated operations. *Enhanced Services Order, supra*, Appendix D (First Report); *CPE Compliance Order*, 93 FCC 2d 599, Appendix B (1983) (Second Report).[1] The First Report described the methods used by AT&T to account for expenses incurred by the AT&T General Departments, AT&T Long Lines (now AT&T Communications), Bell Telephone Laboratories (BTL), Western Electric and the Bell Operating Companies (BOCs) to enable ATTIS to offer enhanced services.

3. The Second Report described the specific audit procedures the staff employed to ensure that AT&T affiliates reported all preoperational and formation expenses attributable to the

[1] Following the issuance of these reports, the divestiture of the BOCs from AT&T was effectuated pursuant to the Modification of Final Judgment in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983), and AT&T restructured its operations after divestiture took place. This report describes procedures which AT&T used prior to divestiture to allocate expenditures for corporate undertakings among operating and other entities within AT&T benefitting from those undertakings. These procedures must be described to enable a determination of the validity of AT&T's treatment of ATTIS-related expenses.

subsidiary's provision of new CPE.[2] Pursuant to paragraph 105 of the decision on *Reconsideration* of *Computer II*, AT&T was required to file semi-annual reports detailing expenses incurred on behalf of ATTIS, identifying the AT&T entities which incurred the expenses and the types of expenses incurred. The last such report was filed in January 1983. These reports are referred to as paragraph 105 reports. *Reconsideration*, 84 FCC 2d at 85-86. The Report described the managerial controls and accounting systems used by AT&T to collect and report the expenses incurred in developing new CPE, and forming the subsidiary. The staff's audit, described in the Second Report, identified over $18 million in preoperational expenses incurred by AT&T, the BOCs and BTL which had not been reported. These expenses have since been included in AT&T's semi-annual reports and reimbursed as required by Commission order.

4. The Second Report also identified various areas which required further examination, including: completing a comparison of selected General Department documentation with items included in AT&T's semi-annual reports; ensuring that the amounts reported included the overhead loadings; examining the accuracy of reports by selected BOCs of expenses attributable to ATTIS; and reconciling AT&T's billings to its affiliates to entries on its general books.

B. *Audit Scope for this Report*

5. Following the issuance of the *CPE Compliance Order* and the Second Report, five general areas of inquiry into the development of ATTIS remained. The objectives of the audit upon which this report is based included:

(1) Completion of the identification of General Departments and BTL direct expenses and overhead attributable to ATTIS;

(2) Identification of direct expenses and overhead expenses incurred by the BOCs attributable to ATTIS;

(3) Identification of company-wide expenses, for the fourth quarter of 1982, for direct sales, installation and maintenance, and product specific advertising for new CPE;[3]

(4) Identification of the expenses incurred by 195 Broadway Corp. related to real estate support for preoperational activities on behalf of ATTIS and fixed assets transferred from affiliated companies to ATTIS;

(5) Reconciliation of license contract billings to affiliates for preoperational expenses to verify that the correct amounts have been reimbursed to the BOCs and Long Lines.

6. The staff discovered certain expenses incurred by the BOCs and other entities within AT&T which should have been but had not been attributed to ATTIS. This amounted to $29.2 million, as compared to the total preoperational expenses, $1.2 billion, reported by AT&T related to

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[2] New CPE has been defined as any CPE which has been acquired by a carrier or manufactured by an affiliated entity after January 1, 1983. Embedded CPE includes all CPE owned by a carrier, including inventory, which was tariffed or subject to the separations process as of January 1, 1983. *Further Reconsideration*, 88 FCC 2d at 513, 528. Embedded CPE was transferred from the BOCs to ATTIS and detariffed as of January 1, 1984. *CPE Detariffing Order*, FCC 83-551 (released December 15, 1983), *recon. pending.*

[3] *See CPE Capitalization Order*, 91 FCC 2d 578, 597-98 (1982), *recon. denied*, 95 FCC 2d 167 (1983), *further recon. denied*, FCC 84-224 (released May 23, 1984).

the provision of CPE. AT&T was informed of these amounts and reported them to the Commission and reimbursed them to affiliates as appropriate.

II. Identification of General Department and BTL Expenses for the Subsidiary

A. Completion of Examination of General Department Budget Decision Packages and BTL Cases

7. In the course of the audit leading to the Second Report, the staff reviewed License Contract Budget Decision Packages (BDPs) and BTL cases under which AT&T and BTL projects were classified through December, 1982. The License Contract was an agreement by which AT&T's General Departments, prior to divestiture, provided advisory, supervisory, administrative and technical services to the BOCs and Long Lines. Expenses for these services were billed to Long Lines and each BOC based on various apportionment factors. *License Contract Inquiry, FCC 83-601 at para. 6 (released January 16, 1984). A Budget Decision Package was the functional statement to which the General Department assigned expenses incurred by each organizational unit in achieving a single result or organizational purpose. CPE Compliance Order*, 93 FCC 2d at 619. Similarly, BTL recorded operating expenses under task descriptions called cases. *Id.* at 620. The staff's review, described in the Second Report, included an examination of more than 11,000 BDPs used by the General Department from 1980 to 1982, and over 2,000 cases used by Bell Telephone Laboratories (BTL) for the same period. From these documents, the staff selected functions that appeared to be related to new CPE development or formation activity, and compared these with the items reported by AT&T. The treatment of unreported items was investigated by the staff in order to determine whether or not the reporting entity followed internal guidelines and otherwise acted reasonably in not including the item in reports to the Commission.

8. The audit resulting in this report focused on more than 500 License Contract BDPs for projects initiated after June 1982, completed the review of approximately 200 BDPs used prior to that date, and followed up to ensure that adjustments were reflected in AT&T's books. The staff also reviewed non-License Contract (NLC) BDPs. As opposed to License Contract BDPs, each AT&T entity had the option of participating in a particular NLC project and could negotiate with the General Departments the portion of expenses it would bear. Each entity funding the project would be directly billed.

9. The staff review following the adoption of the Second Report regarding some BDPs examined in earlier stages of the audit disclosed that the General Departments incurred $5.4 million of additional costs which should have been included in AT&T's preoperational expense reports. This finding was based upon analysis of internal documents furnished by the company and subsequent staff discussions with AT&T representatives concerning BDPs that appeared to be related to CPE development but had not been included in reports to the Commission. A portion of the $5.4 million adjustment was made because the actual reportable expenditures for 1980 and 1981 were larger than the original estimates. The remainder of the adjustment was made because the costs of certain BDPs were partially reportable as related to CPE but were totally unreported because the main thrust of particular BDPs was for something other than CPE development. These amounts have since been included in supplemental preoperational expense reports. In addition, the staff's review of BDPs for projects initiated subsequent to June 30, 1982, disclosed underreporting of preoperational expenses of approximately $300,000. AT&T adjusted subsequent reports to include this amount.

10. Two further problems were discovered in the course of the staff's BDP analysis. Moving expenses of ATTIS employees were charged to administrative BDPs for the Business Services Group. Consequently, they were not charged to preoperational expenses. The staff identified

this under-reporting to AT&T representatives, and as a result of a further study by AT&T, an additional $2.4 million was included in the amounts reimbursed to the BOCs and Long Lines. In addition, charges for communications services were not recorded for the Business CPE preoperational category included in the paragraph 105 reports, although such services were charged to other AT&T projects. Based upon the proportion of communications expenses to total expenditures generated by other programs involving more than one AT&T department, an additional $1 million was added to the amounts to be reimbursed.

11. The staff followed similar procedures when examining non-License Contract BDPs which appeared to be CPE-related. As a result of this review, AT&T agreed to include $6 million in previously unreported costs in its December 1982 report to the Commission. This amount was attributable to BDPs which AT&T had not considered CPE-related until discussions with the staff.

12. In completing its review of cases at BTL from July through December of 1982 the staff did not uncover any deviations from the data contained in paragraph 105 reports. The staff compared selected bills rendered by BTL to the BOCs with work authorizations issued by BTL for the work for which the bill was rendered.

B. Application of Overhead Loadings to General Department Costs Attributable to Development of the Subsidiary

13. In addition to ensuring that each cost directly incurred by the General Departments attributable to the subsidiary was reported, the staff examined the types of overhead costs which AT&T normally applied to the direct costs and the relationship of overhead costs attributed to the subsidiary as compared to overheads used when billing other affiliates. The total overhead attributable to ATTIS in the General Departments was approximately $124.8 million.

14. Overhead costs for work performed on behalf of ATTIS were recovered in two ways. First, since the General Departments functioned only to serve AT&T, License Contract billings were theoretically a mechanism for recovering general and corporate administrative expenses. Second, when a non-License Contract project was billed to particular BOCs and/or Long Lines, certain types of overhead charges and a return on investment (ROI) factor were added to the direct costs. The staff determined that, to ensure that the General Departments did not recover the same overhead twice, the amounts billed as overhead on non-License Contract bills had to be deducted from the amounts billed through the License Contract agreement. To verify that this was done, on a test basis, the staff traced the non-License Contract overhead billings to the affected accounts to ensure that they were reduced on the General Departments' books.

15. The staff reviewed overhead loadings used by the General Departments to ensure that: (1) all preoperational expenses reported by the General Departments included the same overhead loadings used in non-License Contract billings and the additional types of overheads which AT&T agreed to include in preoperational expenses;[4] (2) the methodology for applying loadings to reportable preoperational expenses reasonably reflected the benefit to ATTIS; and (3) overheads used in the non-License Contract billings were subtracted from the appropriate accounts and not included in License Contract billings.

[4] In response to comments on its original enhanced services capitalization plan, AT&T agreed to include employee paid absence costs and general expense loadings (including expenses generated by the executive, accounting, treasury and legal departments, other general office salaries and expenses, and taxes) and a return on investment component.

16. The audit revealed no indication that the methods for allocating overhead and return on investment loadings to reportable expenses were incorrect. In addition, the staff found no evidence of expenses that were included in both LC and NLC bills. As described in the following paragraphs, the audit did reveal underreporting of certain overhead loadings attributable to the subsidiary. These omissions appear to be due to the difficulties General Department employees encountered in using a manual system for allocating overhead during the time that the existing automated system was adjusted to include new types of loadings requested by the staff. The following instances of underreporting, later accounted for in supplemental preoperational expense reports, were discovered.

17. The staff's review disclosed that the rate used by AT&T to compute the loading for pension and relief costs onto all salary expenses reportable for 1982 was understated by 2.32%. The formula used to obtain the loading rate contained the unadjusted salary amounts as the denominator. The denominator should have been the adjusted labor expense, which equals the total labor expense less the salary and wages for employees that are charged directly to overhead pools. This adjustment would produce a lower denominator, and consequently, a higher loading rate. AT&T accepted the staff's reasoning, and increased the reported expenses by $2 million.

18. Staff investigation uncovered that the loading rate used for the general expense overhead was understated by an average of 6.33% for the 1980 and 1981 periods. AT&T had based its general expense loading rate on estimated costs and had not adjusted that rate to reflect the actual expenses. Adjusting for this understatement increased reportable overhead for 1980 and 1981 by $1.4 million.

19. As noted above, AT&T agreed to load reportable salary expense with an employee paid absence factor. The staff discovered that the company's manual application of overhead to salary expense (particularly for employees who only worked part time on reportable activities), omitted this loading. Upon recalculation, AT&T reported an additional $1.3 million of expense.

20. The staff also found that even though fifth level supervisors were directly assigned to non-License Contract projects related to subsidiary formation, their salaries were charged to an administrative BDP and captured through a standard supervisory loading for purposes of preoperational expense reporting. The benefit to the subsidiary was greater because the supervisor, while assigned, worked entirely rather than partially on behalf of ATTIS. Therefore, the loading used for supervision expenses should have been higher. AT&T has also increased its reportable expenses by $1.3 million due to this adjustment.

21. The Second Staff Report noted AT&T's failure to apply administrative services loadings to the reported costs of departments providing services to both regulated and unregulated affiliates. 93 FCC 2d at 629-30. The staff completed its audit of overheads by further analyzing the costs of the administrative division within the Residence Marketing Department, which provided marketing support for residential CPE. The administrative division provided general corporate services to all affiliates in addition to performing general administrative functions. Upon further analysis of the activities of all the marketing departments, the staff discovered that an additional $3.5 million should have been reported and reimbursed to the BOCs. The staff has verified, by reviewing reports filed by AT&T, that these additional dollars have subsequently been included in the reimbursement to the BOCs.

III. *Preoperational Expenses Incurred by BOCs*

22. To finalize the review of preoperational expenses reported by AT&T, the staff reviewed the accounting and reporting of formation expenses incurred by the BOCs. Of a total reported formation expense of $260 million, AT&T attributed $25 million to the BOCs. Most of the balance was attributed to the General Departments.

23. AT&T had, following the initiation of the staff audit, required each BOC to audit formation expenses which the BOC incurred. Some of the initial BOC audit reports, released beginning in early 1983, indicated that the methods for compiling subsidiary-related costs were unreliable. This was due to ambiguous AT&T guidelines for identifying attributable expenses, and difficulty encountered by BOCs in deciding whether certain projects were subsidiary-related or merely continuations of ongoing efforts unrelated to the subsidiary.

24. Attributing activities to either regulated or unregulated activities requires precise guidance. However, BOC auditors found that the initial instructions sent to the BOCs by AT&T were broad and general. In addition, AT&T had assumed that reportable development activity would be authorized by a special group being formed at the General Departments. The BOCs, however, before receiving authorization from this special group made individual decisions to report work as attributable to ATTIS, interpreting the definition of reportable expenses more broadly than AT&T would have. As individual questions concerning responsibility arose, more and more specificity was inserted into the instructions. This refinement activity culminated in an implementation manual being issued by AT&T in September 1982. This manual described in detail the specific activities that were considered reportable preoperational expenses. The staff consulted this manual for guidance in developing its own analysis of the internal audit reports, and in examining the procedures used for field review by the BOCs.

A. *Scope of Audit*

25. In reviewing the BOCs' role in preoperational activities, the staff attempted to ensure that material expenses related to the formation of the subsidiary were not omitted from the BOCs' reports to AT&T, which were incorporated into AT&T's preoperational expense reports to the Commission. Unlike AT&T, the BOCs have generally not been required to add expenses at the suggestion of Commission staff because their internal auditing efforts enabled them to correct deficiencies before the final preoperational expense reports were filed with the Commission, which occurred prior to the Commission staff's field reviews of the BOCs.

26. The staff began its review by examining the internal audit reports for each of the 22 BOCs. These audits were completed between March 1982 and March 1983. The staff assessed the adequacy of the audits conducted and focused on the weaknesses noted by the internal auditors in the methods used by the BOCs to control the reporting of expenses attributable to the subsidiary. For three BOCs, Pacific Northwest Bell, Indiana Bell, and New Jersey Bell, the staff reviewed their audit workpapers which supported the audit reports. These companies were selected because the audit report contained indications of potentially significant reporting problems. A review of the underlying workpapers indicated that the companies had taken steps to resolve the problems described. In addition, the staff questioned representatives of New Jersey Bell, Ohio Bell, New England Telephone, Michigan Bell, Mountain States and Bell of Pennsylvania, concerning those companies' responses to staff findings. Based upon this review, the staff was satisfied that each of these companies had corrected problems identified by the auditors which might have resulted in underreporting of preoperational expenses.

27. The staff then selected five BOCs, which reported almost 60% of the BOC-incurred preoperational expenses, to audit in the field. These BOCs were New York Telephone, Chesapeake & Potomac Telephone, Southwestern Bell, Pacific Telephone and Telegraph Co.

and Northwestern Bell. These BOCS incurred the majority of formation expenses because they employed personnel with the expertise needed by AT&T to organize ATTIS.

B. *Predivestiture BOC Accounting Practices*

28. Prior to the divestiture of the BOCs from AT&T, organizations within the Bell System regularly exchanged personnel to work on specific projects. If AT&T borrowed an employee from a BOC, the BOC would bill AT&T for salary and expenses, or salary alone, depending upon the particular project. This bill was recorded as a charge to the appropriate BDP on AT&T's books, and subsequently billed back to all affiliates receiving a benefit from the project through the LC or NLC billing procedures.

29. Use of this method in accounting for reportable preoperational expenses might have resulted in double reporting of some expenses because both AT&T and each of the BOCs had their own system for recording preoperational expenses. Therefore, AT&T decided that only the original entity incurring a reportable expense would report the expenses to the Commission. That is, if a BOC employee performed a task generating reportable expenses, the BOC, not AT&T, would report the expenses.

30. Generally, the 22 pre-divestiture BOC accounting systems recorded costs in two ways although there were exceptions. For each internal company project, the BOCs charged time and related expenses to a Keep Cost Order (KCO), and summed all the KCO's each month to Part 31 account 100.2, "Plant under Construction."[5] This procedure permits a periodic review of the amounts entered in this account to ensure that work in process is closed out to Part 31 account 100.1, "Plant in service," when the project or construction task is completed. When the BOC did billable work for a customer, the expenses for this task were captured by using a designated Customer Work Order (CWO). CWOs were summed in Part 31 account 139, "Other Deferred Charges." This procedure, again, permits periodic analysis of the amounts booked to this account to ensure that customers are billed for all work performed. Other companies directed employees to charge their time to special tracking codes. The codes were used in mechanized systems to identify and segregate subsidiary-related expenses into separate accounts.

31. Each of the BOCs that the staff audited assigned reportable expenses to either separate KCOs, separate CWOs or unique supporting records. These preoperational expenses were compiled by extracting salary and voucher (*e.g.*, travel, office supplies) expenses associated with the subsidiary from master transaction files. Each BOC used somewhat different methods for compiling reportable expenses. These methods will be addressed below.

32. KCOs contain costs specified in Part 31 of the Commission's Rules, including loadings specified therein. The CWO expenses are loaded differently, and include costs that are not captured by the KCO procedures. Neither type of order generally included all loadings required by the Commission's orders for ATTIS-related expenses. Therefore, in establishing specific KCO or CWO numbers to accumulate reportable expenses, the BOCs had to develop mechanical procedures to load these expenses in accordance with Commission requirements, and also had to adjust some of the loading factors used in automated processing systems.

33. Each company assigned departmental or sectional coordinators to keep track of the reportable activities within their respective groups. Each coordinator reported the results periodically to his company's comptroller. These coordinators were responsible for their respective group budgets, management reports, employee loans, and execution of various

[5] This account was used despite the fact that the BOCs did not actually perform construction work for ATTIS.

contractual agreements. To obtain payment for employee expenses other than salaries, the coordinator as well as the employee's immediate supervisor was required to sign a voucher request. Therefore, when time was charged to specific billable tasks or jobs, the coordinator gathered the authorizations, processed the necessary paperwork, and guided employees where necessary to comply with company procedures and Commission regulations.

C. *Field Reviews of Individual BOCs*

1. *New York Telephone Co. (New York)*

34. The review of expenses reported by New York began with an analysis of internal audit reports. These reports disclosed some initial overreporting, especially in 1981, but these problems were corrected through manual adjustments and were later eliminated, partly through the efforts of the departmental coordinators. The staff traced reported amounts back to original ledger entries, reviewed documentation including time cards and vouchers, and interviewed departmental coordinators to determine whether reportable expenses were documented.

35. New York reported $4.9 million of formation expenses through December 31, 1982, the largest amount reported by a BOC. The staff's review of New York's procedures for determining, recording and billing reportable expenses and applying overhead to reportable expenses disclosed that while procedures were generally reliable, the operating rent and house service expenses reported were insufficient. These are discussed in paragraph 52, *infra.*

2. *Chesapeake & Potomac Telephone Companies (C&P)*

36. The C&P companies incurred $2 million in formation expenses. C&P consists of four separate corporations, C&P Telephone (serving the District of Columbia), C&P of Virginia, C&P of Maryland, and C&P of West Virginia. C&P also has a Headquarters staff that provides support for all four corporations. The expenses incurred by this staff are allocated proportionally to each corporation based on a composite allocator. Consequently, only a part of headquarters expenses appeared in each C&P report to AT&T. The major part of the field review of C&P was conducted at C&P's Maryland offices because C&P of Maryland books reflected expenses for providing payroll procedures for ATTIS in the amount of $1.5 million out of the $2 million total recognized for the C&P companies.

37. C&P did not use its KCO or CWO systems to accumulate formation expenses generated by home office personnel. Instead, this company assigned special headquarters codes for specific formation tasks, and developed a new mechanized program to extract expenses reported to these codes from detailed transaction files. Reporting under these codes was initially inaccurate due to problems in implementing the automated systems, and obtaining correct input from employees. Therefore, 1981 expenses had to be compiled from basic source records by each coordinator. 1982 data generally was compiled accurately and with minor adjustments initiated by C&P, and C&P was able to reconcile the amounts reported to the Commission from their source data.

38. C&P conducted two separate internal audits of the reported formation expenses. The first internal audit report disclosed difficulty in identifying reportable expenses in monthly reports. During 1981 when use of the special reporting codes was left to individual employee discretion, there was much overreporting. In 1982, responsibility for tracking formation expenses was given to departmental coordinators. These coordinators adjusted 1981 records to eliminate duplicative charges, and for 1982, reported costs for the specific employees who had worked on development activities directly from the source records.

39. The staff reviewed these 1981 adjustments, and supporting documents, including bills, and interviewed various employees who had originally charged their time to headquarters codes. This review confirmed to the staff that the adjustments to the 1981 data were reasonable.

40. Because of the reporting problems at C&P, the staff performed a test of all bills issued to AT&T by C&P for employees loaned by C&P to AT&T for ATTIS-related activities during 1981 and 1982. Charges were traced to General Department BDPs, and the work performed under each BDP and expenses incurred were compared with the amounts and types of work reported to the Commission. Based upon these tests, the staff has no basis to conclude that C&P omitted any expenses it incurred in connection with the formation of ATTIS.

3. *Southwestern Bell (Southwestern)*

41. Southwestern reported $3.9 million of formation expenses through December 31, 1982. This figure was verified by the internal auditors of Southwestern through two separate audit reports completed in 1981 and 1982 respectively. The staff reviewed these audits in St. Louis with the internal auditing staff and responsible company representatives in September 1983.

42. The staff's review disclosed that Southwestern used basic Keep Cost Order and Customer Work Order procedures to keep track of formation expenses. KCOs were generally used for construction-related activity and CWOs for other types of expenses in accordance with past practices at Southwestern. Due to the complexity of the reporting requirements established by AT&T, Southwestern had to develop additional manual procedures to record the charges and report them to AT&T. The company's first internal audit report findings disclosed underreporting due to difficulty in implementing the reporting procedures established by AT&T and a lack of specificity in AT&T's reporting guidelines. As a result, the Southwestern auditors recommended using specific KCOs and CWOs to compile subsidiary-related expenses. The second internal audit report found that these guidelines alleviated the difficulties uncovered in the first audit.

43. The staff also examined the internal auditors' work-papers, and the underlying data which supported the conclusions reached in these two audits. The staff followed up by questioning the auditors about the scope of their audits, their procedures for identifying reportable expenses, and the personnel they interviewed. The staff's examination disclosed initially inaccurate reporting of preoperational expenses, but it appears that this problem was rectified. In general, Southwestern's procedures for identifying and reporting expenses attributable to the formation of ATTIS exhibited confusion which may only have been partially alleviated. However, the staff has found no significant omissions.

4. *Pacific Telephone & Telegraph Co. (Pacific)*

44. Pacific reported $2.2 million of ATTIS formation expenses through December 31, 1982. The staff reviewed the internal auditors' workpapers at San Francisco. Pacific used a cost accounting system different from that generally used by the BOCs to record and report these expenses. Pacific uses a three digit tracking code, termed an Area Responsibility Code (ARC) in its payroll and voucher systems, to compile costs. It developed special ARCs for those employees involved in ATTIS-related activities. Pacific was able to extract costs using these codes and issue reports of monthly formation charges to those groups responsible for reporting them.

45. As did the other BOCs, Pacific used departmental coordinators to monitor each of the charges appearing on the summary weekly and monthly detailed reports. In addition, each organization involved with formation activity was required to submit a budget plan to the

comptroller of Pacific Bell. A group was established in the comptroller's department as a centralized point to monitor activity connected with formation expenses. The staff interviewed supervisors and payroll personnel responsible for overseeing the formation activity. The staff also compared the actual expenditures incurred with the initial budgets established.

46. The staff examined Pacific's bills to AT&T for loaned employees and traced these to the General Department BDPs. This test confirmed that Pacific had established reasonable procedures for identifying, separately recording, and reporting expenses relating to the formation of ATTIS.

5. *Northwestern Bell Telephone Co. (Northwestern)*

47. Northwestern reported $2.4 million of formation expenses through December 31, 1982. Northwestern used KCOs and CWOs to capture subsidiary-related expenses and also established a supplementary system, using new codes called area codes, to track subsidiary-related expenses. Area codes are functionally-oriented and are an internal mechanism for recording specific types of expenses.

48. Northwestern's internal audit staff conducted two audits of its formation expenses. This included both an initial and a followup audit. The staff reviewed the auditors' workpapers, the audit scope, and the findings of these two audits with Northwestern's internal audit staff, in Omaha, Nebraska. The Northwestern auditors used a different approach from the other BOCs to identify employees involved in formation activities. They reviewed each organization in the company, and selected those groups where one might expect to find formation activity. The auditors then proceeded to interview each of the department supervisors about the scope of their current work, and possible duties related to the formation of ATTIS. As a result of this effort, the auditors uncovered additional unreported formation expenses.

49. In addition, the staff reviewed the written internal procedures for accumulating reportable expenses, and interviewed supervisors in charge of preoperational activity. The staff also reviewed the types of overhead costs and the allocation methods used to apply the overhead rates. Based on these tests, supporting documents reviewed, and various interviews conducted, the staff finds no basis for challenging the amounts reported by Northwestern.

D. *Application of Overhead Rates to Formation Expenses Incurred by the BOCs*

50. The staff's review of the BOCs' reporting of formation expenses included an examination of the methodology for compiling and allocating overhead and applying the rate of return on investment to the total costs. The review included an analysis of the BOC internal auditors' review of loadings.[6]

51. The pre-divestiture AT&T accounting system applied certain standard loadings to salary dollars of loaned employees. These included charges for rent and house services, Social Security taxes, relief and pensions, supervisory expenses, and general expenses. However, seven BOCs which loaned employees for formation tasks failed to include a loading for rent and house services while three applied an internally generated factor of less than one percent. Expenses for rent and house services includes, among other things, expenses to rent and maintain property for offices, cafeterias, and other company facilities. The low reporting of rent and house services appears attributable to mistaken assumptions by both AT&T and the BOCs as to which entity should apply this factor. Some loaned employees were sent to AT&T

[6] Total overhead loadings for both the BOCs and Long Lines were approximately $8.6 million.

or ATTIS locations, while others remained at their normal duty station in the BOCs. Thus, some of the BOCs apparently presumed that AT&T would apply the rent loading, while others designed and applied their own factor.

52. Regardless of the cause of underreporting, review of the rates applied revealed that on an overall basis, insufficient rent and house service expenses had been allocated to BOC formation expenses. At the staff's recommendation, AT&T agreed to apply to BOC expenses the rate used by the General Departments for this loading, which was approximately 25 percent. Applied to the $18 million total salaries included in BOC formation costs, it was determined that an additional $4.4 million should have been allocated to BOC formation expenses. This amount was included in the amount reimbursed to the BOCs in November 1983.

IV. *Fourth Quarter 1982 CPE-Related Expenses*

53. In the *New CPE Capitalization Order*, the Commission recognized that AT&T could permissibly elect to treat systems mixing embedded CPE with CPE sold during the last quarter of 1982 as wholly related to new CPE. 91 FCC 2d at 598. To protect ratepayers from bearing unwarranted costs during the transition where new CPE would be provided by ATTIS, the Commission required that AT&T separately account for expenses incurred during the last quarter of 1982 in relation to new CPE manufactured and sold or leased prior to January 1, 1983. The expenses specified included direct sales expenses, installation and maintenance expenses, and the expense of product specific advertising. *Id.*

54. The staff focused on accounting for such CPE marketed by the five BOCs which were audited. These BOCs accounted for 37% of the CPE orders processed in the relevant time period.

A. *Direct Sales and Installation and Maintenance Expenses*

1. *CPE Ownership Problems*

55. AT&T's accounting for these expenses proved to be a complicated process. When a customer using a BOC-provided communications system added equipment to that system with an installation date after 1982, that installation would have to be completed by ATTIS under the *Computer II* decisions. After January 1, 1983, BOCs could only provide CPE from inventory. On the other hand, after January 1, 1983, new equipment could only be supplied by ATTIS, thereby creating a dual ownership of systems sold to the same customers containing CPE provided before and after January 1, 1983. This dual ownership had the potential of creating problems concerning the responsibility for installation and maintenance, and confusion in billing and accounting.

2. *Development of Guidelines*

56. To avoid problems arising from joint ownership of CPE, AT&T created guidelines for assigning ownership of all newly-provided equipment sold or leased during the fourth quarter of 1982 to either ATTIS or a BOC. This was intended to avoid duplication of billing, accounting and customer-related services. AT&T assembled a task force to coordinate the development of procedures to implement AT&T's policy for new 1982 sales orders, referred to as transition orders. Procedures from comptrollers, engineering, installation, and marketing organizations were issued concurrently for implementation on or before November 15, 1982. These procedures stipulated that when a BOC marketing account executive sold a system or equipment during the last quarter of 1982 that was identified as a transition order, the customer was requested to sign a transition agreement. This agreement represented the

customer's concurrence that its system or equipment may be assigned to ATTIS to allow ownership and responsibilities to reside with one company. Each agreement was then identified with a unique number which could be used for tracking purposes by both the BOCs and AT&T/ATTIS.

57. The accounting and payment procedures were to operate as follows. Each transition order generated four general categories of expenditures. These were for: (1) engineering work, (2) installation work, (3) marketing effort and (4) equipment purchases from Western Electric. These expenditures for the types of work described were collected during the reconciliation process from original service orders or by extracting hours spent on each activity from departmental logs and charging standardized rates for the hours involved. Included in the calculation of total expenditures for these categories were the standard overhead loadings described earlier. Once total billing for each transition order was calculated and agreed upon by ATTIS, the BOC would then submit on a monthly basis during 1983 a bill to the Comptroller's office of the General Departments of AT&T as transition orders were reimbursed. This was done by all BOCs until all transition orders were analyzed. Even though all transition orders were reviewed individually, it was permissible according to AT&T guidelines for the BOC to provide AT&T with a bill summarizing more than one order. When AT&T had completed its review of these bills and was in agreement regarding the total charges reported, AT&T submitted payment to the appropriate BOC. This was intended to be completed within 30 days from the time the bill was issued by the BOC.

58. These procedures, however, were apparently disseminated too late in 1982 to avoid misunderstandings among BOC personnel as to the ownership and responsibility for various CPE orders and related expenses. This confusion resulted in inaccurate billing and accounting for numerous orders, and required extraordinary efforts by AT&T and the BOCs to reconstruct the proper ownership, responsibility, and accounting for each CPE sale made during the fourth quarter of 1982.

3. *AT&T and BOC Reconciliation Efforts*

59. In early 1983 guidelines were developed to rectify the aforementioned problems. These guidelines were developed by an interdepartmental project team under the direction of the Comptrollers Corporate Accounting Methods Organization and provided a data collection process whereby each transition order could be traced from the point the 1982 sale was negotiated to the completion of installation and customer billing. Interim steps provided for a determination of actual asset ownership, reassignment of asset ownership if necessary, determination of the costs billable to ATTIS, correction of errors discovered in the process, correction of errors made in bills to customers, and assignment of billed revenues to the owner of the assets.

60. In April 1983, AT&T appointed a Project Manager from the General Departments of AT&T to act as a coordinator between the General Departments and the BOCs. His first step was to have the comptroller of each BOC designate a project team leader, who in turn would establish a reconciliation team at each BOC. The role of these BOC project teams was to provide guidelines for ensuring proper reconciliation and adjustment of assets, expenses, and revenues associated with transition orders not in ownership contention; to provide a point of contact for assistance and guidance in resolving transition orders where ownership was unclear; to coordinate with other officials within each BOC. In order to aid the BOCs in their reconciliation process a transition order reconciliation form was developed by the Project Manager and the reconciliation teams at each of the BOCs. The form guided BOC personnel in identifying data pertinent to the assignment of CPE and billing and accounting for CPE-

related expenses. By May 1, 1983, the reconciliation process was well underway in all of the BOCs, and all reconciliation work was completed by December 30, 1983.

4. *Bureau Review and Findings*

61. Between September 1983 and March 1984, concurrent with the review of BOC-incurred preoperational expenses, Bureau staff conducted field reviews of five BOCs' accounting and reconciliation processes for fourth quarter 1982 CPE expenses.

62. The first field review of BOC accounting for fourth quarter 1982 CPE expenditures was conducted at Southwestern Bell in September 1983. The staff first met with AT&T's Project Manager for Southwestern. The staff was informed that AT&T had hoped to complete the review of transition orders by June 30, but had been delayed by the late arrival of transition orders from AT&T and the fact that some of the original guidelines were unclear and therefore had to be amended. In addition, the reconciliation was delayed by difficulties encountered in locating employees who had written transition orders, then transferred to other employment at the time of restructuring occasioned by divestiture. Many orders could not be reconciled without consulting these employees. For these reasons, the processing work of the reconciliation team at Southwestern as well as other BOCs, was not completed until the fall of 1983.

63. Southwestern's reconciliation team leader explained to the staff each of the reconciliation steps. The staff then reviewed approximately 20 randomly selected transition orders as they were being processed by the team, guided by the transition order form developed by AT&T. The staff tested both the accounting for direct costs, and the application of overhead loadings, particularly in the areas of engineering and installation and maintenance.

64. The staff's review disclosed that Southwestern devoted ample resources to reviewing transition orders, including physical review of the installation work by Southwestern's Installation and maintenance group. The reconciliation team had to pay particular attention to resolution between Southwestern and ATTIS of billing questions, *e.g.*, confirmation of whether ATTIS was billing the customers instead of Southwestern; confirmation that ATTIS was billed the appropriate amount for equipment installation performed by Southwestern; and confirmation that Southwestern was not billing customers for ATTIS-owned equipment. In certain cases orders had been cancelled, but equipment was still shipped. It was therefore necessary for the reconciliation teams to determine the disposition of that equipment with Western Electric. In all cases, it took time to initiate the proper remedial action once problems were identified.

65. At the time of the field review, Southwestern's reconciliation team had completed reviewing approximately half of the 1,960 transition orders initiated by Southwestern. In early November 1983, Southwestern informed the staff that all remaining work had now been completed and that bills were being prepared for AT&T. The final AT&T Transition Order Reconciliation Status Report (Status Report) indicates that Southwestern billed ATTIS for $377,000 for transition order-related expenses. Based upon its review of reconciliation procedures in general and sampling of Southwestern's reconciliation process, the staff found no reason to challenge this amount.

66. The other companies at which field reviews of the reconciliation process were conducted were C&P in November 1983; Pacific in January 1984; Northwestern in February 1984; and New York in March 1984. At each company the staff interviewed the reconciliation team leader as to the process followed. The reviews also included staff analysis of guidelines for

reconciliation and the testing of cost information reported on transition order reconciliation forms and the application of overhead loadings.

67. C&P had not completed the reconciliation process at the time of review. C&P attributed the delay to the fact that most of the people who wrote the 1591 orders which AT&T delivered to C&P for determination of ownership are no longer working at C&P (many were transferred to ATTIS). C&P reported that it had to absorb all costs related to approximately 300 of the orders because all costs were assignable to it under transition order guidelines or there was insufficient data to identify them as transition orders.

68. Despite the fact that the original guidelines were difficult to follow, C&P's internal auditor was satisfied that the reconciliation team had conducted its work effectively, and the staff's review disclosed no evidence to show inadequacies in C&P's reconciliation process. In March 1984 the staff followed up its review at C&P, including review of the bills to AT&T and receipt of payment by C&P. The staff has found no basis to challenge the Status Report's determination that the transition orders initiated by C&P generated expenses billable to ATTIS of $115,000.

69. Pacific processed 2,302 transition orders. This was the largest number of Transition Orders assigned to any BOC. The staff reviewed the internal audit findings. The auditor found that the reconciliation team was able to overcome initial vagueness and complications in the reconciliation process.

70. In addition to the review procedures described above, the staff reviewed all the bills submitted by Pacific to ATTIS for payment and the receipt of payments from AT&T. The billing process at Pacific is broken down into two regions, Northern and Southern. The staff's review covered all payments to both regions and uncovered bills outstanding. The staff also found bills on Pacific's books that were not on the reconciliation team's list. The total amount of all unaccounted for bills was $99,801. During the review, the staff requested copies of the payment vouchers for these bills once they were received from AT&T. The staff has since received copies of the receipts, which confirmed the amounts discovered. The staff finds no reason to challenge the Status Report's statement that, with the adjustments described above, the 2302 orders processed by Pacific generated more than $4 million in billable costs.

71. The staff found that a total of 474 transition orders were assigned by AT&T to Northwestern. Northwestern's reconciliation effort began in November 1982 when it received a system letter from AT&T, covering the billing procedures to be applied to transition orders. A reconciliation team was assembled in April 1983 and was in full operation by May.

72. From the beginning of the project, Northwestern placed special emphasis on ensuring that those organizations which were responsible for generating the transition orders would participate in the reconciliation process. All reconciliation work was completed by July 1983. Bills were issued to AT&T in August. Payments were received from AT&T during the fall of 1983. The staff reviewed both the bills submitted and payments received. The review disclosed that one supplemental bill amounting to $30,024.73 was still outstanding. Northwestern informed the staff that it would resubmit this bill to AT&T. Subsequent to the staff's review, Northwestern submitted to the staff a copy of the receipt showing payment for this bill. The Status Report shows that the transition orders processed by Northwestern generated $141,000 in billable expenses. The staff did not discover any reason to challenge this amount.

73. The leader of New York's reconciliation team stated that New York completed its review of the assigned transition orders by the end of October 1983. The review effort required 15

employees assigned on a full time basis. Work commenced on this project in early May 1983. A total of 1466 transition orders were assigned to New York by AT&T.

74. As with the other BOCs, the staff reviewed and tested New York Telephone's reconciliation processes for these orders concerning the guidelines and procedures followed, the costing information reported on the reconciliation forms used, and the application of overhead loadings. The leader of the reconciliation team reported that New York Telephone had already billed AT&T for $235,223 and that New York Telephone had received payment for these bills. The staff reviewed both the bills and the receipts of payment. The review disclosed no reason to challenge these representations, which are consistent with the Status Report.

6. *Conclusion on Transition Orders*

75. The five BOCs which the staff audited encompassed 37% of the total transition orders processed by all BOCs (7,793 out of a total of 18,831). The staff believes that the review of transition orders at these five BOCs was sufficient to provide a thorough understanding of how the BOCs processed these orders. Overall, AT&T has reported that 18,831 transition orders were processed by the BOCs, with total costs billed to ATTIS of $13,283,134.

B. *Product Specific Advertising*

76. The Commission required AT&T to segregate the costs incurred for CPE-related product specific advertising for the last quarter of 1982. This advertising expense would be subject to reimbursement to ratepayers where appropriate. On January 25, 1984, AT&T submitted to the FCC staff an analysis of the product specific advertising used in the fourth quarter of 1982. This AT&T-provided analysis included a schedule of specific ads, the media used, the products advertised, and the total expense during the fourth quarter. AT&T derived the amount reimbursable from the actual bills received from its advertising agency. This agency prepares a media advertising report annually, depicting each advertisement and the medium used, and documenting the number of times each ad was broadcast or published during the year. From this report AT&T identified the ads for specific products, and confirmed that the amount noted in the report for each ad was the same as the amount billed for that ad. This process was verified by reviewing subordinate records maintained by AT&T's advertising department.

77. The staff reviewed AT&T's accounting for advertising in May 1984, in Morristown, New Jersey. The staff analyzed the total AT&T advertising account for the periods 1980-1982 to develop a picture of the company's total advertising program. The staff was then able to verify that data contained in subordinate records that supported the actual bills were reflected in the books of account. The next step was to review AT&T's process for determining which ads related to specific products. Each ad inserted on television and the print media was examined, and ads which were classified in subaccounts other than those for CPE-related advertising. The staff also discussed the development cycle for AT&T's advertising budget, as well as the implementation of the advertising programs approved by AT&T. The effects of product and strategy changes, late product releases, and personnel shifts upon the advertising program were also explored with AT&T's advertising representatives. This overview of the department's operation guided the staff's review of whether AT&T had included the correct expenses in calculating product specific advertising expenses for the designated period.

78. The staff's examination of the expenses reported uncovered two areas of omission. First, AT&T failed to report the expense of advertising research for specific CPE items. Such research included preliminary discussions and studies regarding the most effective advertising strategy. This led to underreporting of $100,000. AT&T had also failed to report the prepayment of production costs for ads that ran during the fourth quarter. The amount

omitted was also estimated to be an additional $100,000. These amounts have been added to the reported amounts for product specific advertising for the last quarter of 1982. Staff review disclosed no other failure to identify advertisements directed toward new CPE to be offered for sale by ATTIS beginning January 1, 1983.

V. *Contribution of 195 Broadway Corporation to ATTIS Formation or Product Development*

79. To ensure that all relevant areas of expenses relating to ATTIS were reviewed, the staff found it necessary to review the responsibilities of 195 Broadway Corporation. 195 Broadway provided real estate planning and services for the General Departments. Among its ATTIS-related activities was preparation of buildings for ATTIS staff and provision of accommodations of loaned BOC personnel assigned to developmental activity at the General Departments. 195 Broadway billed the AT&T General Departments for its services, and AT&T recovered the costs from the BOCs and Long Lines through the License Contract agreements. During the formation of ATTIS, 195 Broadway supplied similar services to ATTIS, such as leasing a building for ATTIS development staff at Murray Hill, New Jersey, and transferring buildings in Orlando, Florida, for use as the ATTIS data center.

80. Our examination was conducted at the offices of 195 Broadway in New York City, and consisted of interviews with 195 Broadway personnel and tests of records for the period 1980 through 1982. The staff verified entries made by 195 Broadway regarding the transfer of assets to ATTIS on December 31, 1982 and transactions between 195 Broadway and affiliates other than the General Departments.

A. *Description of Operations of 195 Broadway*

81. This subsidiary's main function was to provide real estate management services for AT&T corporate locations. These services included constructing, owning and leasing buildings; administering office space facilities and equipment; providing related housekeeping support; and providing transportation for AT&T personnel.

82. In addition, 195 Broadway, as needed, provided consultation on technical real estate matters such as lease negotiation and facilities planning to the BOCs. Charges for such services were identified and billed to the respective organization. Transportation charges, *e.g.*, for use of the motor pool, chauffeurs, and aircraft, were also billed directly to the requesting organization. The remaining expenses were charged to AT&T, and subsequently billed by AT&T to the BOCs through the license contract agreements.

B. 195 Broadway Accounting Procedures

83. 195 Broadway used a cost classification structure that provides information both to corporate management and tenants receiving services. The system was designed to answer the following questions:

(1) Who incurred an expense?

(2) What location or physical asset received the service?

(3) What function was performed relating to the expenditure?

(4) What was the type of expense?

(5) Was there a project or work authorization involved?

84. The staff determined that most of the preoperational expenses incurred by 195 Broadway consisted of leasehold improvements and the acquisition of office furniture and equipment. These expenditures were of a capital nature, and the assets were transferred to ATTIS at net book value. In reporting 195 Broadway support for work related to ATTIS, AT&T applied a

loading for rent and house services to the direct labor expenses reported for ATTIS activity during the periods when preoperational expenditures were incurred. AT&T disputes the staff's contention that AT&T has underreported the loadings for rent and house services by approximately $1.2 million. The staff is in the process of resolving this dispute in the near future and does not believe the amount in question is significant enough to delay the release of this Final Report.

VI. Reconciliation of License Contract Billings to General Department Books

85. The second preoperational expense report (*New CPE Order*, Appendix B) listed areas of examination yet to be completed. One of these items was a reconciliation of License Contract billings to the AT&T general books covering the period through December 31, 1982. The staff recommended that AT&T request its independent auditors to perform this reconciliation.

A. Reconciliation Process

86. On May 13, 1983, AT&T hired Coopers & Lybrand (C&L) to perform this audit. The scope of the audit was enlarged to encompass a reconciliation of the expenses reimbursed to the BOCs and Long Lines through December 31, 1982. AT&T submitted C&L's plan to the Commission staff for concurrence before the audit commenced. The staff compared the C&L plan with its own audit plan, and found that C&L's scope would cover most areas of concern to the Commission. The staff requested C&L to broaden its scope to reconcile the amounts reported by AT&T to the Annual Report of License Contract and Services Report for 1982 compiled by NARUC.

87. According to Coopers & Lybrand, its review incorporated the following steps:

"1. For the years ended December 31, 1981 and 1982, we traced on a test basis General Department incurred License Contract and non-license Contract CPE/FSS[7] expenses as reported per Paragraph 105 Reports to American Telephone and Telegraph Company's general ledger.

2. For the years ended December 31, 1980 and 1979, we traced on a test basis General Department incurred License Contract and non-license CPE/FSS expenses as reported per Paragraph 105 Reports to supporting documentation received from American Telephone and Telegraph Company project managers responsible for CPE/FSS (ATTIS) projects.

3. For the years ended December 31, 1980 through December 31, 1982, we traced on a test basis Bell Telephone Laboratories, Incorporated ("BTL") reported Research and Systems Engineering expenses to American Telephone and Telegraph's general ledger.

4. We reviewed supporting documentation from Western Electric Company and inquired of appropriate American Telephone and Telegraph personnel, and noted that there were no Western Electric Company CPE/FSS expenses billed to the General Department that came to our attention for the four years ended December 31, 1982.

5. For the period May 5, 1980 through December 31, 1982, we traced on a test basis CPE/FSS expenses directly billed by BTL to the BOCs and Long Lines from the appropriate BTL Work Case or Subcase to BTL billing records.

[7] FSS refers to ATTIS.

6. For the years ended December 31, 1982 and 1981, we reviewed billings from the BOCs to the General Department for CPE/FSS expenses to ensure that proper reimbursements were made for those costs that were in turn billed out as License Contract Costs.

7. We traced General Department incurred License Contract and non-License Contract CPE/FSS expenses, and BTL Research and Systems Engineering expenses, to appropriate license contract billing documentation noting those expenses billed to the BOCs and Long Lines versus those expenses excluded from License Contract billings.

8. We traced amounts in (5) above to reimbursement data provided by BTL to American Telephone and Telegraph Company.

9. We traced those expenses billed to the BOCs and Long Lines and subject to reimbursement noted in (7) and (8) above to the final reimbursement. This included recomputing accrued interest on the reimbursements, vouching the reimbursement to the BOCs and Long Lines, and reviewing the General Department's accounting entries for propriety, in accordance with FCC Order 82-496 (32368) released November 10, 1982." Report from Coopers & Lybrand to American Telephone and Telegraph Co. (June 30, 1983).

88. C&L completed its review on June 30, 1983, and stated in its letter to AT&T, "no matters came to our attention that caused us to believe that CPE and FSS expenses incurred from the period January 1, 1979 through December 31, 1982 were not properly summarized and reconciled from supporting documents, properly reimbursed to the Bell Operating Companies and Long Lines ... or given proper accounting treatment."

89. The staff was concerned by the lack of definitiveness in this statement. The staff reviewed the auditors' workpapers at the C&L office in Washington, D.C. The staff analyzed the procedures C&L employed, and requested that the audit manager clarify the reasons that certain audit tests were made. The staff also sought clarification of C&L's position described in its letter to AT&T.

90. C&L informed the staff it could not issue a certified opinion because its audit did not comply with the American Institute of Certified Public Accountants' audit standards required for certification. According to C&L, its audit scope did not include verifying the original source data from which reported expenses were compiled.

B. Conclusion

91. Although C&L only reviewed accounting procedures and the reimbursement to the BOCs and Long Lines, Commission staff addressed the validity of original source data, the step which C&L did not take. The staff's review included reviews of source data including BDP documentation, bills, vouchers, receipts, internal planning documents and other materials and interviews with relevant AT&T and BOC personnel. Therefore C&L's audit complemented the staff's audit by providing assurance that AT&T's procedures to tie individual figures reported by AT&T to its overall accounting system were adequate.

VII. *General Conclusion*

92. The Commission staff has reviewed within the limits of available resources company procedures, internal audits, source documents and books of account and reports filed with this Commission, and has conducted interviews with personnel at all relevant organizations, regarding the reporting and reimbursement of preoperational expenses incurred in develop-

ing AT&T's subsidiary for CPE and enhanced services. Based upon this review, with the exception of adjustments identified in this and earlier reports, the staff has found no evidence that AT&T improperly accounted for preoperational expenses incurred for ATTIS.

Common Carrier, Depreciation Rates

This Order denies petitions to revise the depreciation rates for Southern Bell and Southwestern Bell.
—*AT&T Co.*

FCC 84-505

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for:

American Telephone and Telegraph Company - Long Lines Department
Michigan Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company
Southern Bell Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company

ORDER ON RECONSIDERATION

Adopted: October 25, 1984; Released: October 31, 1984

BY THE COMMISSION:

I. Introduction

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed.

2. On December 20, 1983, we released FCC Order 83-587 in which we represcribed depreciation rates for the eight domestic telephone companies captioned above. On January 19, 1984, separate petitions for reconsideration of this order were filed by Southern Bell Telephone and Telegraph Company and Southwestern Bell Telephone Company. On January 27, 1984, the Commission issued a public notice requesting comments and reply comments on the Southwestern Bell petition, and on February 16, 1984, the Commission issued a public notice requesting comments and reply comments on the Southern Bell petition. In this order we will consider both petitions and the comments and reply comments received pursuant to our public notices.

II. Southern Bell Petition

3. In its petition Southern Bell alleges that the rates prescribed by the Commission in FCC Order 83-587 are not adequate for the Company's operation in a competitive environment, that the prescription of these rates is inconsistent with the Commission's policies encouraging competition in the industry, that the use of these rates will increase the potential for bypass of Southern Bell's network by large telecommunications users, and that the Commission should adopt the rates which Southern Bell initially proposed in its depreciation rate study of November 1982.

4. In response to the February 16, 1984, public notice, comments were filed by Michigan Bell, NYNEX, Wisconsin Bell, and the public utility commissions of Florida, Georgia, and North Carolina. Reply comments were filed by Southern Bell. The local operating telephone companies[1] support Southern Bell's contentions that the prescribed rates are too low and that the continued use of these rates will encourage bypass. The state commissions generally support the prescribed rates and disagree with Southern Bell's contentions. In contrast with the Company's position, the Georgia Commission argues that the use of the high depreciation rates proposed by Southern Bell would likely increase bypass activity. Finally, both the Florida and North Carolina commissions allege that Southern Bell has presented no new evidence that warrants reconsideration of our original prescriptions.

III. Southwestern Bell Petition

5. In its petition Southwestern Bell alleges that it has a serious reserve deficiency and that the rates prescribed by the Commission in FCC Order 83-587 will result in an increase in this reserve deficiency. It specifically requests that we: (1) prescribe higher depreciation rates for the COE-Analog Electronic account, (2) rescind our concurrence with the

[1] We include NYNEX in this category because it consists primarily of two local telephone companies, New York Telephone Company and New England Telephone and Telegraph Company.

life and salvage estimation techniques currently used by our staff, (3) allow the use of the equal life group (ELG) depreciation method for embedded plant, and (4) allow the use of an amortization procedure to recover the existing depreciation reserve deficiency.

6. In response to the January 27, 1984, public notice, comments were filed by Pacific Bell, the Kansas State Corporation Commission, and the Missouri Public Service Commission. Reply comments were filed by Southwestern Bell. Pacific Bell supports Southwestern Bell's requests, especially the proposed amortization of the current reserve deficiency and the prescription of shorter service lives. The Kansas and Missouri commissions generally support the prescribed rates. The state commissions also argue that no new evidence has been provided to warrant reconsideration of the prescribed rates.

IV. Discussion of Issues

7. Before discussing the merits of the petitioners' allegations regarding the adequacy of their prescribed rates, it is useful to review the procedure followed by the Commission that led to the prescription of those rates. Both Southern Bell and Southwestern Bell prepared voluminous depreciation studies, including both narrative argument and background data, in support of their proposed depreciation rates for each account and subaccount. These studies were thoroughly reviewed by our staff and by the staffs of the affected state commissions. Our staff, the staffs of the state commissions, and Southern Bell discussed the studies and the staff reviews in detail at a meeting in February 1983. A similar meeting of all parties was held for Southwestern Bell in June 1983. At the Southern Bell meeting agreement was reached between our staff and the state commission staffs regarding the life and salvage factors to use in setting depreciation rates. At the Southwestern Bell meeting three-way agreements were reached on life and salvage factors for nearly all accounts and jurisdictions.[2] Subsequent to these meetings, we issued a public notice which contained the annual depreciation expense that would result from the prescription of rates recommended by the state and federal commission staffs. In addition, the public notice listed the accounts and jurisdictions in which there were disagreements regarding either the life and salvage factors or depreciation methods used to determine the depreciation rates. Numerous state commissions, telephone companies, and other organizations commented in support of or in opposition to our staff's proposals. Our staff then reviewed and summa-

[2] The major account for which three-way agreement was not reached for Southwestern Bell was COE-Analog Electronic. For this account our staff and the staffs of the state commissions reached agreement, while the Company supported much shorter life estimates.

rized these comments. Prior to our adoption of FCC Order 83-587, we took into consideration the staff's recommendations, the comments received in response to the public notices, and the companies' original studies.

8. The procedures described above clearly allowed all parties a reasonable opportunity to present and discuss their views. The petitioners question, however, whether their views have been given adequate consideration. They allege that our rates are based largely upon historical information and that we have ignored their argument that, due to the more competitive environment in which they must now operate and the rapid technological changes that are occurring, the future will not mirror the past. However, as has been discussed at length in recent staff review letters and in recent three-way meetings, we give consideration to a wide variety of data in reaching our conclusions regarding depreciation rates. Among the information considered are recent actuarial mortality data and trends, company plans for equipment modernization, regulatory and court actions which may affect equipment lives, and technological developments. Contrary to the companies' allegations, in FCC Order 83-587 we selected life estimates for many accounts much lower than recent mortality data and trends would suggest.[3] We did so primarily because we believe that changes in the telecommunications marketplace and technological developments will act to limit the service lives of a large amount of telephone plant below the levels that have been experienced in recent years. In contrast to the concerns expressed by the companies, the staffs of many of the state commissions have expressed concern that we may have given too much weight to the companies' arguments and forecasts and not enough weight to the more objective actuarial mortality analysis.

9. The proper balance between the use of historical company data and trends (i.e., actuarial mortality data) and the companies' independent forecasts has been a central issue in the establishment of depreciation rates in recent years. Because the depreciation rate setting process revolves around forecasts of future events (i.e., plant retirement) this balance must be established by our informed judgments — judgments which are made after all pertinent data are analyzed and weighed. This is what we have done in FCC Order 83-587, and we see no new evidence or persuasive argument in the petitions that indicate we should now change the life and salvage estimates or the rates prescribed in that order.

10. In its petition Southwestern Bell specifically questions the life estimates we used to determine depreciation rates for its COE-Analog Electronic account. It suggests that we have not given adequate consider-

[3] For example, we established projection lives for Southern Bell's Underground Cable Exchange subaccount approximately 40% lower than recent mortality data or trends would support. For Southwestern Bell we established projection lives for the same account approximately 45% lower than recent data would support.

ation to its argument that rapid technological changes and customer demands for more advanced services, such as equal access, will significantly reduce the service lives of this equipment. These factors and their probable impact on service lives were analyzed in the Company's studies and related correspondence and were discussed at the three-way conference. It was largely because of the strength of Southwestern Bell's arguments that we reduced the life estimates so substantially from those that underlay the previously prescribed rates.[4] In addition, the life estimates we selected for Southwestern Bell's COE-Analog Electronic account are consistent with those which were agreed to and used to prescribe rates for most of the other telephone companies in FCC Order 83-587. This consistency exists primarily because the studies and discussion presented by Southwestern Bell and the state commissions which regulate Southwestern Bell were very similar to the studies and discussion presented in the depreciation rate review of the other telephone companies. Southwestern Bell has provided no information, either in its studies, correspondence, or this petition, that gives credence to a conclusion that its analog electronic switches will experience service lives appreciably shorter than those of the other telephone companies. In light of Southwestern Bell's petition, we have reexamined its initial studies and related correspondence and the comments presented by the affected state commissions and have come to the conclusion that the life estimates which underlie the rates we prescribed for the COE-Analog Electronic account in FCC Order 83-587 are reasonable and need not be changed in this proceeding. We will, of course, continue to monitor lives and salvage factors for this account and revise them as necessary.

11. Southwestern Bell also alleges that the use of the prescribed rates will exacerbate its reserve deficiency problem rather than help to resolve it. We do not agree. The prescribed rates are remaining-life rates and, as such, contain adjustments to allow for the correction of imbalances in the reserve position. To the extent that an account shows a reserve deficiency, a remaining-life rate based upon realistic life and salvage factors allows for an increment to the annual depreciation expense to "write down" the deficiency. As stated earlier, we believe the life and salvage factors underlying the prescribed rates are realistic. As a result, we conclude that the prescribed remaining-life rates will reduce the reserve deficiences which exist for Southwestern Bell.

12. The petitioners assert that the prescription of unrealistically low depreciation rates will result in inflated future rate bases and costs. They believe that overstated future costs will eventually lead to uneconomic bypass of their networks by the larger telecommunications users. In

[4] In FCC Order 83-587 we reduced the average service lives for Southwestern Bell's COE-Analog Electronic account by approximately 25%, from 26 years to 19 years.

contrast, various state commission staffs have argued that the use of high depreciation rates now will lead to uneconomic bypass in the near term. Thus, both the companies and the state commissions agree that the overstatement of costs can cause uneconomic bypass. We believe this is a reasonable conclusion; however, the rates prescribed by the Commission in FCC Order 83-587 are based upon straight line depreciation principles and our estimates of the most realistic life and salvage factors. As such, these rates reflect our carefully considered attempt to match the allocation of capital costs to the rate of consumption of capital assets. We believe the prescribed rates will not lead to any appreciable overstatement of current or future costs, and thus are consistent with our efforts to avert uneconomic bypass.

13. Finally, Southwestern Bell raised the issue of whether existing depreciation procedures should be changed to allow for a more rapid rate of depreciation. In particular, Southwestern Bell suggested that it be allowed to use ELG procedures to determine the depreciation rates for its embedded plant. This issue was discussed at length in the order and no new persuasive arguments have been brought to light in the petitions. As a result, we find no reason to reconsider this issue at this time. Southwestern Bell also suggested that it be allowed to use an amortization procedure in lieu of remaining-life rates. It did not, however, define the reserve deficiencies by account, nor did it propose specific amortization rates (or amounts) by account, and most importantly, it did not adequately document or pursue this approach during the review process. As a result, we do not believe Southwestern Bell's proposal warrants adoption in this proceeding.

14. In conclusion, neither petitioner has presented any new fact or argument that would warrant our reconsideration of FCC Order 83-587. Nor do they convince us that we did not adequately consider the facts and arguments presented and discussed during the course of the original proceeding. We agree with the state commissions' comments that both Southern Bell's and Southwestern Bell's arguments for reconsideration were fully considered by the Commission in reaching its original decision. Having no new facts or arguments before us and believing that our original decision was sound, we reject the petitions for reconsideration of Southern Bell and Southwestern Bell.

V. Ordering Clause

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i) and 220(b), that the petitions for reconsideration of FCC Order 83-587 filed

by Southwestern Bell Telephone Company and by Southern Bell Telephone and Telegraph Company are denied.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Aeronautical Advisory Station
License Revocation
Notice of Filing
Notice, Sufficiency of

Commission upholds Private Radio Bureau's decision not to begin revocation proceeding against Aeronautical Advisory radio station licensee. Although licensee did not notify airport owner of its Aeronautical Advisory radio station application within time frame specified by Section 87.251(e) of the Commission's Rules, it substantially complied with that section by giving actual notice. License revocation is not warranted.
—*City of Kerrville*

FCC 84-464

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of City of Kerrville 600 Main Street Kerrville, Texas 78028 Against Dugosh Flying Service, Inc. P.O. Box 931 Kerrville, Texas 78028 License of Aeronautical Advisory Radio Station KEP-4	PR-2821-S

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1984; Released: October 4, 1984

BY THE COMMISSION:

1. This Commission has before it an application for review[1] received on April 13, 1984, from the City of Kerrville, Texas (the "City"). The City has applied for review of the Chief, Private Radio Bureau's (the

[1] Dugosh filed its opposition on April 19, 1984. The City did not file a reply.

"Bureau"), denial on March 15, 1984, of City's request for revocation of the license of Dugosh Flying Service, Inc. ("Dugosh"), for Aeronautical Advisory ("unicom") radio station KEP-4.

2. The City made its request for revocation proceedings against Dugosh in a letter received by the Bureau on February 6, 1984. The basis for the request was the City's contention that Dugosh failed to notify the City as required by Section 87.251(e) of the Commission's Rules.[2] On February 29, 1984, the Bureau received a letter from Dugosh's attorneys contending that Dugosh had substantially complied with Section 87.251(e). As indicated above, the Bureau denied the City's request on March 15, 1984, and the City applied for review of the denial on April 13, 1984.

3. The City is co-owner (with the County of Kerr) of the Kerrville Municipal Airport. This matter began on April 29, 1982, when the Kerrville Flying Service, which had been the "Fixed Base Operator"[3] ("FBO") at the Kerrville Municipal Airport went out of business. On the request of the City, Dugosh took over as interim FBO on May 1, 1982, and agreed to provide certain services, including unicom service. However, Dugosh discovered that there was no unicom license and that it would be necessary to apply for one. According to Dugosh it notified the City of its intention to apply for a unicom license in a letter dated June 5, 1982. The City says it has no record of having received this letter or any other notification. Dugosh says it mailed a unicom application to the Commission's Houston, Texas, field office in June 1982. Unicom applications are required to be filed with the Commission's Private Radio Bureau Licensing Division in Gettysburg, Pennsylvania. The Commission has no record of the application sent to its Houston office.

4. When Dugosh did not receive a unicom license, it decided to refile. According to Dugosh, on March 14, 1983, its general manager, Mr. Len Tucker, informed Calvin McNeely, manager of Kerrville Municipal Airport, of Dugosh's intent to obtain a unicom license. Dugosh then filed a unicom application which was received at the Commission's Gettysburg, Pennsylvania, facility on May 23, 1983, and granted on July 25, 1983.

5. The City says that in July 1983, it terminated Dugosh's authority to be interim FBO. On August 4, 1983, the City signed a lease agreement with KX Aviation ("KX") designating KX as FBO at Kerrville Municipal Airport. The agreement included a provision that KX would provide unicom service.

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[2] Section 87.251(e) provides in part: "An applicant for an aeronautical advisory license . . . must give notice of such application to the owner of the landing area to be served and all aviation service organizations . . . within the 10-day period immediately preceding the filing of the application with the Commission.

[3] A Fixed Base Operator is an organization which provides various aviation services at an airport.

6. When the City discovered that a unicom license had been issued to Dugosh, it complained to the Commission in a letter dated September 29, 1983, that Dugosh had not notified it of Dugosh's unicom application, as required by Section 87.251(e) of the Commission's Rules. At the same time the City filed its own unicom application. The City's complaint led to correspondence between the Bureau and Dugosh (letters to Dugosh December 6, 1983, and January 16, 1984; responses dated December 16, 1983, and February 28, 1983) and eventually to the City's letter requesting revocation of Dugosh's license received February 6, 1984. On March 15, 1984, the Bureau denied that request and dismissed the City's unicom application as defective under Section 1.958 of the Commission's Rules (since the exclusive unicom assignment was already held by Dugosh).

7. In essence, the City's primary argument in its application for review is that Dugosh violated Section 87.251(e) and, therefore, the Commission must start revocation proceedings against Dugosh. On the contrary, the authority to revoke licenses given to the Commission by Section 312 of the Communications Act of 1934, as amended, is discretionary. Section 312 provides, in part: "The Commission *may* revoke any station license . . . " (emphasis supplied). The Commission has consistently held that Section 312 creates no rights in third parties but simply gives the Commission discretion to decide whether to institute revocation proceedings. *Puerto Rican Media Action and Educational Council, Inc., et al*, 51 FCC2d 1178 (1975); *Radio Para La Raza*, 40 FCC2d 1102 (1973); *Salem Broadcasting Co.*, 1 FCC2d 655 (1965). In fact the Commission does not even recognize "petitions to revoke." *Puerto Rican Media Action and Educational Council, Inc., et al, supra.*

8. It clearly was not an abuse of discretion for the Bureau to fail to start a revocation proceeding. The Bureau's determination that there was no substantial violation of Section 87.251(e) of the Commission's Rules is correct. Although Dugosh did not comply with the letter of the rule, it did make a good faith effort to notify the City of its application.[4] It sent a letter to the City and later orally notified the City's agent, the airport manager. Furthermore, given the circumstances, the City must have known of the likelihood that Dugosh would file an application and the filing could hardly have been a surprise. The City had designated Dugosh as interim FBO and requested that it furnish unicom service, which required a license.

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[4] We also note that Aeronautical Advisory Station applications are placed on Public Notice by the Commission, pursuant to the requirements of Section 309(b) of the Communications Act. Section 87.251(e) of the Rules was intended to give additional public notice of the application beyond that required by Section 309(b). See *Notice of Proposed Rule Making*, Docket No. 16621, 31 FR 6909 (1966); *Report and Order*, Docket No. 16621, 7 FCC2d 137, 139 (1967).

9. A second argument for initiating revocation proceedings raised in the City's application for review is that Dugosh also failed to notify Kerr County, the other co-owner of Kerrville Municipal Airport, thus violating Section 87.251(e). Since the factual basis for this argument was not brought to the Bureau's attention when it made ruling here reviewed, the argument is not entitled to consideration now. In addition, the City cannot claim to be prejudiced by any failure to notify its co-owner, in view of Dugosh's good faith attempt to notify the City directly.

10. The City's application for review fails to state any basis for changing the Bureau's action. Therefore IT IS ORDERED that the City's application for review IS DENIED.

11. It is also ordered that copies of this Memorandum Opinion and Order will be mailed to the parties at the addresses shown in the caption and to their attorneys as follows: Thomas S. Terrell, Esq., 102 Kellogg Building, Kerrville, Texas 78028; and Dennis C. Brown and Robert H. Schwaninger, Jr., Law Offices of Jeremiah Courtney, 2120 L St., N.W., Washington, D.C. 20037.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier
Common Carrier, International Record Carrier
Customer Premises Equipment

Report and Order adopted detariffing embedded customer premises equipment (CPE) owned by Western Union and the international record carriers. Carriers should follow existing accounting regulations for removing assets from regulated service. Methodology adopted for valuating the CPE should be selected by reference to the principles adopted in detariffing of AT&T's embedded CPE.
—*Customer Premises Equipment*
CC Docket No. 81-893

FCC 84-511

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

FOURTH REPORT AND ORDER

Adopted: October 26, 1984; Released: November 5, 1984

BY THE COMMISSION:

I. Background

1. This Report and Order continues the process of implementing the Commission's decision in the *Second Computer Inquiry*[1] to detariff customer premises equipment (CPE)[2] provided by Western Union and the

[1] *Amendment of Section 69.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 FCC 2d 384 (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C.Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n* v. *FCC*, 103 S.Ct. 2109 (1983) (hereinafter collectively referred to as *Computer II*).

[2] Customer premises equipment includes any equipment provided by a common carrier and located on the premises of a customer, except overvoltage protection equipment, simple

international record carriers (hereinafter collectively referred to as the record carriers). Prior orders in this docket have addressed the implementation of detariffing of AT&T's embedded CPE, CPE used in the provision of mobile services, and CPE provided by the independent telephone companies.[3] In the *Notice of Proposed Rulemaking* in this docket,[4] the Commission proposed to detariff any record carrier CPE not already detariffed by December 31, 1987. To accomplish detariffing, the Commission proposed to allow the record carriers to submit detariffing plans demonstrating that the carriers would adhere to the general principles developed in the *AT&T Order*, as well as the Commission's accounting rules.[5] We sought comment on whether our proposals equitably balanced the interests of ratepayers, users, and the record carriers. We also sought comment concerning the treatment of CPE already removed from regulated service. This Order generally adopts the proposals as set forth in the *Notice*, with the modifications noted below.

2. Subsequent to the *Final Decision* in *Computer II*, the Commission, as part of a proceeding to unbundle record carrier CPE from the provision of service, ordered that the international record carriers detariff telex equipment. *Interface of the International Telex Service with the Domestic Telex and TWX Service*, Docket No. 21005, 86 FCC 2d 411 (1981) (*IRC Telex Detariffing Order*) *aff'd sub nom. Western Union Telegraph Co.* v. *FCC*, 674 F.2d 160 (D.C.Cir. 1982). The order did not apply to Western Union Telegraph Company (Western Union),[6] and did not implement the detariffing of any non-telex CPE owned by these carriers. By August 1981, the international record carriers had removed their telex equipment from tariff. In 1982 and 1983, these carriers also removed some non-telex CPE from tariff.[7] Some of the carriers detariffed

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inside wiring, intrasystem wiring, or multiplexing equipment used for the delivery of multiple channels to a customer.

[3] *See* CC Docket No. 81-893, Report and Order, 95 FCC 2d 1276 (1983) (AT&T Order); CC Docket No. 81-893, Second Report and Order, FCC 84-269, released June 29, 1984 (Mobile Services Order); and CC Docket No. 81-893, Third Report and Order, FCC 84-483, released October 26, 1984 (Independents' CPE Order).

[4] 94 FCC 2d 76 (1983) (hereinafter *Notice*).

[5] *Id.* at 110-11.

[6] At the time the Commission issued the order, Western Union was restricted to the provision of domestic record carrier services, while the international record carriers were restricted to providing record carrier services from certain "gateway" cities to international locations. The record carriers now compete for domestic and international traffic, as a result of recent amendments to the Communications Act, and the Commission has authorized Western Union to provide international service. Record Carrier Competition Act of 1981, P.L. 97-130, 95 Stat. 1687, Dec. 29, 1981, 47 USC § 222 (1983); Western Union Telegraph Co., 94 FCC 2d 472 (1983).

[7] As authority for detariffing non-telex CPE, the IRCs' relied upon the *IRC Telex Detariffing Order* and the *Computer II* decisions. While the Common Carrier Bureau permitted these carriers to detariff the specified non-telex CPE, the carriers were

all of their CPE by transferring it to a separate subsidiary, while others detariffed selected non-telex CPE. Thus, only Western Union's embedded CPE, along with some of the embedded non-telex CPE provided by the other record carriers, remains under tariff.[8]

3. Two carriers submitted comments in response to our *Notice* concerning the detariffing of record carrier CPE. TRT Telecommunications Corporation (TRT) argues that it has already complied with the goals of the *Notice* by transferring all of its CPE to a separate, but commonly-controlled, company. Western Union submitted substantive comments, objecting to the application of the general principles developed in the *AT&T Order* to the record carriers. Western Union specifically objects to the use of net book value as the transfer value for the CPE, and the requirement that this equipment be offered for sale at net book value during a "price predictability" period.

II. Discussion

A. Determination of Applicable Principles

4. In the *Notice*, we proposed to allow each record carrier to submit a CPE detariffing plan which would explain the detariffing principles and procedures which the carrier proposed to follow. In the *AT&T Order*, we stated that the record carriers could look to the principles developed in the AT&T case to determine how detariffing should proceed. *AT&T Order*, 95 FCC 2d at 1377-78. Western Union complains that it is unable to discern which principles should apply, and argues that if the AT&T procedure is adopted in its entirety, the record carriers will suffer serious competitive

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required to maintain separate books of account in the event a different valuation standard for embedded CPE was required as a result of Commission action in this docket. *See e.g. TRT Telecommunications Corp.*, Mimeo No. 6293, released September 14, 1982 (authorizing TRT to detariff its leased channel terminal equipment). International record carrier CPE which remains under tariff, and which will be detariffed pursuant to this Order, includes: RCA Global, Tariff No. 79, handset equipment for Datel; RCA Global, Tariff No. 80, station equipment for Press Bulletin service; RCA Global, Tariff No. 75, station equipment for Overseas Stock Ticker service; RCA Global, Tariff No. 98, teleprinter equipment for Sports Bulletin service; Western Union International, Tariff No. 11, handset equipment for Datel; Western Union International, station equipment for Press Bulletin service; FTC, Tariff No. 13, handset or teleprinter equipment for Datel; ITT Worldcom, Tariff No. 47, station equipment for Press Bulletin service; ITT Worldcom, Tariff No. 42, station equipment for Overseas Exchange Ticker service; ITT Worldcom, Tariff No. 44, teleprinter equipment for International Sports Events Reporting Service; TRT, Tariff No. 16, equipment for Telegram-Mexico (this appears to be the only equipment not transferred by TRT).

[8] Pursuant to the *Computer II* decisions, any CPE which was tariffed or otherwise subject to the separations process as of January 1, 1983, is considered embedded. CPE which enters a carrier's inventory on or after that date must be offered on a non-regulated basis. Further Reconsideration, 88 FCC 2d at 526.

disadvantages.[9] In addition, Western Union argues that Section 35.1-7(b) of the Commission's Rules governs the removal of assets from the rate base, and that the Commission should consider how this section relates to the principles developed in the AT&T case.

5. Although our original proposal, as discussed in the *Notice*, would provide maximum flexibility to the record carriers in detariffing CPE, we believe that considerations of consistency, fairness, and administrative convenience require that we specify the legal and accounting principles pertinent to this proceeding. Resolution of the issues raised by Western Union will enable the record carriers to detariff CPE in a manner consistent with the requirements which we view as necessary to accommodate the public interest. Furthermore, by alleviating uncertainty to the maximum extent possible, we can expedite the detariffing process. For reasons discussed *infra* at para. 11, however, we decline to impose one methodology to accomplish detariffing. Although we will elucidate the principles which will apply to the removal of CPE from the rate base, the carriers are free to fashion any detariffing mechanism consistent with the policies explained here.

B. Relevant Accounting Rules

6. Western Union argues that we should not require the record carriers to submit detariffing plans until we have explained how the relevant accounting rules affect the detariffing process. Western Union argues that Section 35.1-7(b) of the Commission's Rules should govern the accounting methodology associated with this process.

7. Sections 34.1-7(b) and 35.1-7(b) of the Rules establish the accounting procedures to be followed in transferring record carrier assets from regulated accounts to non-regulated accounts. Section 34.1-7(b) applies to most of the international record carriers, while Section 35.1-7(b) applies to Western Union and the remaining record carriers. The provisions and effect of the two sections are identical. Pursuant to these rule sections, the transfer is accounted for by crediting the appropriate plant accounts and charging the depreciation reserve account by the amount credited. The depreciation reserve account is then credited, and the non-regulated account charged, with the "estimated fair value" of the assets transferred. Any loss or gain on the transaction is therefore reflected in the depreciation reserve account, which raises or lowers the value of the rate base. The only open issue with regard to the detariffing of record carrier CPE is the determination of what constitutes "estimated fair value." *See Amendment of Parts 34 and 35*, CC Docket No. 83-678, FCC 83-398, released Sept. 1, 1983, at para. 34.

[9] Western Union's specific allegations regarding competitive disadvantages are discussed *infra*, para. 10.

8. Sections 34.1-7(b) and 35.1-7(b), therefore, do not determine what constitutes "estimated fair value." The Commission must determine the valuation issue consistent with the principles established in *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C.Cir. 1973) and related cases, *cert. denied sub nom. D.C. Transit System* v. *Democratic Central Committee*, 415 U.S. 935 (1974). The *Democratic Central Committee* case requires that a gain or loss on the transfer of regulated assets be charged to the group — *i.e.*, ratepayers or shareholders — who bore the risk of loss when the assets were regulated. 485 F.2d at 807-08. Record carrier ratepayers have generally borne the risk of loss on record carrier CPE.[10] Thus, while Sections 34.1-7(b) and 35.1-7(b) specify the accounting procedures used to transfer regulated assets to non-regulated accounts, they do not address valuation to be assigned to the embedded CPE.

C. Valuation

9. The *Notice*, in proposing to detariff record carrier CPE, did not specifically suggest that the Commission establish the "estimated fair value" of the CPE to be transferred. The *Notice* instead proposed to accomplish detariffing by reference to the general principles used in detariffing AT&T's embedded CPE. The *AT&T Order* adopted economic value as the valuation standard to be used in detariffing, and defined economic value as the price a carrier would be willing to pay for its CPE if, instead of owning it, the carrier had the opportunity to purchase it. *AT&T*

[10] Western Union argues that, pursuant to Section 35.1-6(j) of the Commission's Rules, the shareholders bear the risk of loss when CPE is sold out of the rate base. We conclude, however, that, not withstanding Western Union's assertion, ratepayers are entitled to the gains, if any, on the transfer of equipment to non-regulated accounts. In reaching this conclusion, we first note that, under *Democratic Central Committee*, "our task . . . is properly to balance the investor and ratepayer interests so as to apportion gains and losses in the most equitable manner." *American Tel. & Tel. Co., Charges for Interstate Telephone Service*, Docket No. 19129, Phase II, 64 FCC 2d 1, 66 (1977), *quoted in AT&T Order*, 95 FCC 2d at 1314. Our conclusion here that ratepayers are entitled to any gains represents an equitable apportionment for the following reasons. First, under our ratemaking policies, ratepayers have borne the risk of loss due to obsolescence or casualty loss for the assets involved during the period of their use in regulated service. Second, investors have had an opportunity to earn a fair rate of return on their investment in these assets throughout such period of use in regulated service. *See, e.g., International Carriers' Rates*, CC Docket No. 20778, 75 FCC 2d 726 (1980) (electing to maintain existing authorized rate of return of 7.5 to 8.5 percent). Third, the combination of these first two factors has resulted in the insulation of investors from any losses affecting these assets during the period of regulated service. In other words, no investor risks have been associated with this investment. In these circumstances, investors have no claims to any gains upon the removal of these assets from regulated service. *See Democratic Central Committee*, 485 F.2d at 806 ("[A]n investor can hardly muster any equitable support for a claim to appreciation in asset value where he has been shielded against the risk of loss on his investment . . . .").

Order, 95 FCC 2d at 1306. But we determined that measuring the economic value of AT&T's embedded base was impractical. As a result, we adopted net book value as a surrogate for economic value.[11] *Id.* at 1306-07.

10. Western Union argues that the use of net book as a surrogate for economic value is unnecessary and undesirable in the case of the record carriers. Western Union asserts that the use of net book, in combination with the post-transfer control requirements imposed on AT&T, would have negative effects on the market for record carrier CPE because net book value exceeds the market value of the equipment. Thus, a requirement that the record carriers offer their in-place equipment at net book to customers would bring sales of in-place CPE to a halt. Western Union argues that economic value can be measured by reference to recent sales of equipment.

11. The decision of how to measure the economic value of record carrier CPE has been complicated by deregulatory events which have occurred since our adoption of *Computer II* and by the regulatory history of these carriers. In some cases, the record carriers have already transferred their equipment at net book value to separate subsidiaries. In TRT's case, the transfer was made to an affiliated non-carrier company which is commonly controlled by TRT.[12] While these events would not render our adoption of an alternate valuation measurements standard impossible, we hesitate to impose a measurement which, for example, would require these carriers to attempt to appraise their CPE as it existed at the time of the transfer.[13] The practical problems of measuring the value of CPE which has long since been removed from the rate base seem to require that a surrogate value, such as net book, be employed. The use of net book value, however, presents equally difficult problems with respect to other carriers. Some of the record carriers have had their depreciation rates prescribed by Commission order.[14] Others have been free to alter their depreciation rates without obtaining Commission approval. Thus, some of the carriers have been able to adjust depreciation rates to changes in the CPE marketplace, as that marketplace is affected by economic, technological, and regulatory factors. These differences in the regulatory environment may affect the degree to which a carrier

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[11] As used here, "net book value" is the original cost of an asset less the related depreciation reserve. *See AT&T Order*, 95 FCC 2d at 1306, n.40.

[12] *See* TRT Transmittal No. 973, May 22, 1981; TRT Transmittal No. 995, Dec. 4, 1981; and TRT Transmittal No. 1028, July 20, 1982.

[13] Even if we were to impose such a requirement, it is doubtful that these carriers could locate all of the CPE transferred. Some of the CPE has no doubt been sold or otherwise removed from the inventory of the subsidiary or non-carrier company.

[14] *See, e.g., ITT WorldCom*, FCC 74-1420, released Jan. 6, 1975, and *Western Union Telegraph Co.*, FCC 77-19, released Jan. 11, 1977.

should be required to protect the interests of ratepayers in transferring the equipment to non-carrier accounts. Therefore, even if we were to require that the CPE be transferred at net book, it would be difficult to determine on the basis of our record here what, if any, additional requirements would be necessary pursuant to our obligations under *Democratic Central Committee.*

12. Rather than impose one methodology for measuring economic value, we will allow the record carriers to determine independently the "fair value" of their CPE for the purpose of making the necessary accounting entries prescribed in Sections 34.1-7(b) and 35.1-7(b). In all cases, the methodology employed should be consistent with the principles enunciated in *Democratic Central Committee* and applied in the *AT&T Order. See id.* at 1312-19. If, for example, a carrier seeks to transfer its equipment at net book value, it should consider whether the risk of loss or gain on the transfer remains with the group which carried the risk of loss or gain when the CPE was regulated. The record carriers should further consider whether post-transfer controls similar to those imposed on AT&T would be necessary under the circumstances, especially where the equipment is transferred at net book value. The same is true if the carrier seeks to establish economic value by reference to appraisals or some other valuation methodology.

13. Adoption of a flexible, individual method of valuing CPE has the advantage of avoiding across-the-board requirements which could prove difficult or impossible to implement with the carriers as a group. We are not unaware, however, of the fact that this approach creates the potential problem that a carrier may determine "fair value" in a manner which is at odds with *Democratic Central Committee.*[15] For example, the carrier could grossly undervaluate its CPE, only to allow its shareholders to receive the actual gains on the CPE as it is sold out of a nonregulated account. We conclude, however, that the likelihood that a carrier would manipulate transfer value in this manner appears minimal and our review of the plans will focus on this issue. In addition, as a result of various deregulatory activities in recent years, the marketplaces for record carrier services and CPE have become increasingly competitive.[16] All the

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[15] To ensure that the dangers of price manipulation will be minimized, we are requiring the carriers to report their detariffing plans to the Commission. *See infra* at para. 15.

[16] In the *Competitive Common Carrier* proceeding, the Commission found the record carrier industry was subject to sufficient competition to warrant forbearance treatment. *Competitive Common Carrier Services,* 95 FCC 2d 554, 571-2, 577 (1983), *aff'd* FCC 84-394, Mimeo No. 34934, released August 27, 1984. These carriers, however, will be regulated pursuant to streamlined regulatory procedures until December 31, 1984, when a portion of the Record Carrier Competition Act expires. *Id.* at 578; 47 U.S.C. § 222(e). *See also Interconnection Arrangements,* 93 FCC 2d 159 (1983) (resolving issues related to the implementation of the Record Carrier Competition Act of 1981, P.L. 97-130, 95

record carriers now compete for both domestic and international business. Customers no longer need separate terminals to communicate on each carrier's facilities. In addition, the carriers are prevented from cross-subsidizing services and CPE, by virtue of the Record Carrier Competition Act. As a result, numerous non-carrier suppliers of CPE have been able to compete with the carriers in the CPE marketplace. Moreover, the industry is under increasing competitive pressure from companies providing a range of substitutable services, particularly in the domestic market. Accordingly, attempts to manipulate the transfer or sale price will be frustrated by competition in the CPE and service markets, as well as by the accounting safeguards we outlined in *Computer II*. We further intend to safeguard against one-time or continuing cross subsidy by evaluating, as part of our review of the transfer, the carriers' proposed valuation standard in light of the prior depreciation history and the competitive environment.

D. Related Issues

14. In addition to the CPE to be transferred, the carriers may have supporting assets which will also have to be transferred to nonregulated accounts. Generally, supporting assets are shared between the provision of CPE and other tariffed services. Carriers should follow existing procedures we have established in accounting for these shared assets. Any segregated supporting assets should be transferred in a manner consistent with the policies adopted in the *AT&T Order*, where we also employed economic value as the valuation standard.[17] 95 FCC 2d at 1366-67. Land and buildings are to be appraised and transferred at appraised value. As in *AT&T*, we will not require appraisal of other types of segregated supporting assets. Carriers should determine which valuation methodology should be employed consistent with *Democratic Central Committee* principles.

E. Procedural Matters

15. In implementing *Computer II*, we must be concerned with ensuring that the record carriers comply with the principles developed in *Democratic Central Committee* and our relevant accounting rules. Accordingly, we will require that the record carriers submit reports to the

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Stat. 1687, 47 U.S.C. § 222); *IRC Telex Detariffing Order*, *supra* para. 2 (detariffing the IRCs' telex CPE); *Gateways Order*, 76 FCC 2d 115 (1980) (opening up more "gateway" cities for the origination and termination of IRC traffic); *Unbundling Order*, 76 FCC 2d 61 (1980), *stay denied*, 77 FCC 2d 929 (1980) (unbundling the provision of services and CPE).

[17] We will take no action at this time regarding detariffing any inside or intrasystem wiring provided by the record carriers, because the record in this proceeding does not address the issue. Detariffing of embedded inside and intrasystem wiring will be addressed separately in due course.

Common Carrier Bureau detailing their plans for removing CPE from tariff, and explaining how the process they have elected fulfills the *Democratic Central Committee* requirements. For the purpose of this report, Western Union should include plans regarding all of its CPE. The other record carriers should include plans for any CPE not detariffed pursuant to our order in CC Docket No. 21005, *supra*, para. 2. Carriers such as TRT who have detariffed non-telex CPE based upon the general *Computer II* finding that CPE should be detariffed, shall be required to justify the valuation methodology employed in detariffing, and to adjust their books retroactively if changes are required. The *Notice* proposed to detariff record carrier CPE no later than December 31, 1987. There appears to be no reason to defer detariffing until that date. As part of our review of the carriers' detariffing plans, we will evaluate whether CPE customers will have sufficient opportunity to purchase in-place equipment, or to purchase or lease other equipment, in a manner consistent with the plan adopted for AT&T. Thus, a carrier may detariff its CPE earlier if it demonstrates that its CPE customers will have the opportunity to evaluate present arrangements and pursue alternatives. Proposals explaining how the carriers will execute this process are due no later than July 1, 1985. To allow CPE customers adequate time to make other CPE arrangements, detariffing should not occur earlier than six months from the date the plan is filed. In all cases we will require that record carrier CPE should be detariffed no later than December 31, 1987, pursuant to *Computer II*. Detariffing plans will be placed on public notice, and will be subject to modification pursuant to our obligations under *Democratic Central Committee*.

III. Ordering Clauses

16. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, and 403, the policies, rules, and requirements set forth herein ARE ADOPTED.

17. IT IS FURTHER ORDERED that Western Union and the international record carriers submit proposals regarding the detariffing of CPE to the Chief, Common Carrier Bureau, no later than July 1, 1985.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Conflicting
Application, Contingent
Interlocutory Ruling, Appeal From

Review Board grants appeal from an interlocutory ruling and sets aside ALJ's order that would have forced an applicant to choose which of two applications it would continue to prosecute. Board holds that ALJ lacked authority to force an election and that the applications were neither contingent nor conflicting.
—*Gene Sudduth Co., Inc.*
MM Docket No. 84-589

FCC 84R-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
The Gene Sudduth Co., Inc. Paris, Texas	MM Docket No. 84-589 File No. BPH-830510AF
Earlyne G. Lund Paris, Texas	MM Docket No. 84-590 File No. BPH-830803AD
Jacklyn Merchant, et. al. d/b/a/ Lamar County Broadcasting	MM Docket No. 84-591 File No. BPH-830808AG
Palm/Prairie Broadcasting, Inc. Paris, Texas	MM Docket No. 84-592 File No. BPH-830808AH
For a Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 1984; Released September 21, 1984.

BY THE REVIEW BOARD: BOARD CHAIRMAN MARINO AND MEMBERS JACOBS AND BLUMENTHAL ISSUING A SEPARATE STATEMENT *EN BANC.*

1. The Review Board again has under consideration an appeal filed August 28, 1984 by Palm/Prairie Broadcasting, Inc. (Palm/Prairie) from the Presiding Judge's *Memorandum Opinion and Order*, FCC 84M-3621, released August 21, 1984, in the above-captioned proceeding. The ALJ's ruling would require Rodney G. Dore, a 55% owner of Palm/Prairie, to elect on or before August 31, 1984 whether he will prosecute the subject application or the application of Riviera Communications-Sanibel, Inc., an applicant for an FM station at Sanibel, Florida, of which Dore is a 49% owner. By Order, FCC 84R-62, released September 4, 1984, we stayed the ALJ's ruling pending completion of the Board's review of the subject appeal.[1] For the reasons that follow, the appeal will be granted and the ALJ's forced election, set aside.

2. We have recently held that where, as here, an ALJ's interlocutory order does not specifically terminate an applicant's right to participate as a party to a proceeding and the applicant does not obtain the ALJ's permission to appeal, the subject appeal is unauthorized and should be dismissed. *Payne Communications*, FCC 84R-61, released August 31, 1984; *see Federal Broadcasting System, Inc.*, 41 RR 2d 491 (1977). However, a petition for extraordinary relief may be entertained to interdict egregious error or flagrant abuse of discretion. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971); *Hanover Radio, Inc.*, 52 RR 2d 403 (Rev. Bd. 1982). Palm/Prairie's appeal will be treated as such a petition.

3. While it is well established that a presiding officer has great latitude and discretion in regulating the course of hearing procedures, *e.g.*, *Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982), the Commission regards any attempt by either an ALJ or the Review Board to challenge the basic validity of a hearing designation order as beyond its authority. *See Frank H. Yemm*, 39 RR 2d 1657 (1977). In the instant case, the ALJ's attempt to force Dore to elect which of two applications to prosecute is predicated upon his view that, as of the time of hearing designation, Dore's Paris application was "contingent" upon the fate of his Sanibel proposal and therefore violated Section 73.3517 of the Commission's Rules, 47 CFR 73.3517, an anti-contingency regulation. FCC 84M-3621, *supra*, para. 6 and n.1. Hence, the ALJ's Order attempts to rectify the hearing designation authority's (Mass Media Bureau) presumed error by forcing Dore to choose between his Paris and

[1] Oppositions to the appeal were filed by The Gene Sudduth Company, Inc. (Sudduth) and Lamar County Broadcasting (Lamar) on September 10, 1984.

Sanibel applications or have his Paris application dismissed. However, the Commission held in *Comark Television, Inc.*, 51 RR 2d 738, 741 (1982), that a request for a forced choice under such circumstances is tantamount to an application for review of the hearing designation order, which must be presented to the Commission, rather than the ALJ. Therefore, we conclude that, in the instant case, the ALJ lacked authority to force an application choice upon Dore. *Accord, Voce Intersectario Verdad America, Inc.*, FCC 84M-739 (ALJ 1984) (ALJ holds that he lacks authority to force an application election, citing *Comark, supra*). The appropriate course for Palm/Prairie's competitors was to challenge the hearing designation order before the Commission, not the ALJ. *Comark, supra.*

4. Our second ground for setting aside the ALJ's forced election is our conclusion that Dore is also correct on the substantive issue and that his Paris application is not contingent upon the Sanibel one after all. It is conceded by Sudduth that the Paris and Sanibel applications "were not inconsistent when filed, nor are they now inconsistent by virtue of any conflict with Commission rules." Sudduth Opposition to Appeal, *supra*, n. 6. Sudduth argues that Dore made the applications inconsistent (and contingent) by amending them (as of right on the "B" cut-off date) to add a promise by Dore that if "both" applications were granted, he would relinquish his interest in Palm/Prairie to the other principals of the corporation. Palm/Prairie November 9, 1983 amendment, at 1. The ALJ, Sudduth, and Lamar have apparently interpreted this promise as meaning that Dore would sell out his Palm/Prairie interest *as soon as* the Sanibel application is granted, even if the Palm/Prairie application is still pending, resulting in the mandatory dismissal of the Palm/Prairie application (because of a 55% "major" ownership change), pursuant to Section 73.3573(b) of the Rules, 47 CFR 73.3573(b). However, this is contrary to the plain meaning of Dore's promise, which speaks of divestiture only if and when *both* applications are granted, and flies in the face of Dore's subsequent attempts to clarify the matter. E.g., Palm/Prairie opposition to motion to dismiss or enlarge issues, filed July 26, 1984, at 6.

5. Dore's interpretation of his divestiture commitment also appears to be supported by the Hearing Designation Order itself (49 Fed. Reg. 2444, published June 13, 1984), which specifically references the commitment without any negative comment and adds "appropriate conditions" (para. 31) providing that "in the event of a grant of the Palm application *and* the application of Riviera Communications - Sanibel, Inc. on channel 285A at Sanibel, Florida, Dore will divest himself of all interest in, and sever all connections with Palm" (emphasis added) (para. 34). Dore maintains that this discussion attests to the propriety of his commitment and foreclosed any contrary acts by the ALJ under *Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717, 8 RR 2d 991 (1966) (reasoned analysis of matter in

designation order precludes contrary action by subordinate FCC official absent previously unknown information). But the ALJ concluded that the *Atlantic* criterion was not met by the Order because there was no specific discussion of the possibility that the commitment created a contingency rule violation. FCC 84M-3621, *supra*, n. 1. In addition, the ALJ relied on *William H. Hernstadt*, 56 RR 2d 948 (Mass Media Bur. 1984), in which the Commission recently ordered a forced election between two applications that were found to conflict because grant of both would have violated the Commission's multiple ownership rules.

6. As previously noted (paragraph 4, *supra*), it is clear that grant of both the Palm/Prairie and Riviera applications is not inconsistent with the Commission's multiple ownership or any other substantive rules. Hence, since both the *Hernstadt* and *Comark* cases involved forced elections where the multiple ownership rules would otherwise have been violated, reliance on them in the instant case is misplaced. In other words, Dore's divestiture commitment here was strictly his own idea — probably motivated by a desire to avoid a comparative diversification "demerit" in the Sanibel proceeding — and not mandated by the Commission's rules. And while the revised anti-trafficking provisions of Section 73.3597 of the Rules, 47 CFR 73.3597, might be implicated by a Dore transfer of control after grant of both applications to Dore's companies, this is not the same as the allegedly "inappropriate" and "impermissible" hearing burden incorrectly conjured up by the ALJ in FCC 84M-3621, *supra*, para. 7 — the abandonment of the Palm/Prairie application during the hearing process. Although Dore's divestiture commitment may call into question the permanence of his Palm/Prairie full-time integration proposal (see FCC 84M-3621, *supra*, n. 2, in which the ALJ opined that "It would be inappropriate to credit Dore's integration when it could evaporate at any given point . . . ."),[2] we applaud his candor and find nothing legally improper or wasteful of administrative resources in permitting him to prosecute both applications. The proper place to weigh the impact of Dore's divestiture commitment is in the comparative hearing process, not at the point of hearing designation. We find that judgment implicit, if not explicit, in the Hearing Designation Order herein and consistent with all cited precedent concerning contingent applications. Thus, regardless of whether the ALJ's forced election was also precluded under the *Atlantic* criterion, it clearly exceeded the bounds of existing substantive case precedent and cannot stand.

[2] *See also High Sierra Broadcasting, Inc.*, 55 RR 2d 627 (Rev. Bd. 1983) (contingent integration proposal given no credit), *rev. denied*, FCC 84-434, released September 19, 1984.

7. ACCORDINGLY, IT IS ORDERED, That the appeal filed August 28, 1984 by Palm/Prairie Broadcasting, Inc. IS GRANTED, and that FCC 84M-3621 IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

SEPARATE STATEMENT OF THE BOARD *EN BANC*

Our decision here — legally correct, we believe — nonetheless exposes flaws in the manner in which "contingent" applications are processed. The 55% owner of the Palm/Prairie applicant, Rodney G. Dore, is concurrently prosecuting an application for an FM station in Sanibel, Florida. But, Dore has stipulated that he will abandon Palm/Prairie if its instant application and the Sanibel application are both granted. Since Dore is Palm/Prairie's majority owner, his premature departure from that applicant would effectively result in a dismissal of the Palm/Prairie application, *see* 47 CFR §73.3573(b), thus mooting much of the instant hearing litigation.

It is agreed by all Board Members that *William H. Hernstadt*, 56 RR 2d 948 (M.M. Bur. 1984), is not on all fours and that, for the reasons set forth *ante*, the ALJ's mandate to Dore to elect between the Palm/Prairie and the Sanibel application was error. However, the situation presents an adjudicatory problem not neatly soluble at this level. That is, the ALJ indicated that he would not credit Dore's fulltime integration proposal here because it could "evaporate" if his Sanibel application is granted. *See ante*, para. 6. But, suppose — hypothetically — the Sanibel ALJ were to award that permit to a Dore competitor, and that action were affirmed up the line. Dore would then likely demand that his Palm/Prairie integration credit be restored by taking official notice of his loss in Sanibel, a "contingency" he has expressly provided for in this proceeding. Could the Commission sustain the rejection of Dore's Palm/Prairie integration proposal under such circumstances, or would it be compelled to take notice of the changed factual circumstances and not proceed on the fiction that Dore "might" be awarded the Sanibel permit? Or, on the other hand, suppose the Sanibel proceeding is only at an initial stage; would Dore demand integration credit here because a Sanibel grant to him is "merely speculative"?

We believe that, as in *Hernstadt*, the Mass Media Bureau ought to address the matter of "contingent" application proposals with an eye toward eliminating hearings (or issues therein) which might become moot by virtue of collateral events. Saying no more, we commend this conundrum to the Bureau for its consideration.*

* A copy of our order will be sent to the Mass Media Bureau.

Contour, Interference
Contour, Measurements

Application for review denied. In calculating HAAT of radiation center of the antenna along pertinent radials, Commission's rules provide that elevations between 2 to 10 miles from antenna site shall be employed. Commission does not consider terrain shielding in its computer evaluation of low power television and television translator applications, since there is no universally accepted method of predicting effects of terrain shielding.
—*Holston Valley B/cing Corp.*

FCC 84-453

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Holston Valley Broadcasting Corporation	File No. BPTT-820614T0
For Construction Permit to Modify the Facilities of Television Translator Station W70AX	
Kingsport, Tennessee	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: September 28, 1984

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed February 21, 1984, by Holston Valley Broadcasting Corporation ("HVBC"), licensee of television translator station W70AX, Kingsport, Tennessee. The Application for Review seeks review of a January 19, 1984, action by the Mass Media Bureau staff, denying HVBC's Petition for Reconsideration and returning the above-captioned application as unacceptable for filing.

2. HVBC filed its application for construction permit to move from Channel 70 to Channel 25 on June 14, 1982. The application was returned by letter dated October 26, 1983, because the proposed operation on Channel 25 would cause objectionable interference to WKAS-TV, Channel

25, Ashland, Kentucky, and, thus, was unacceptable for filing. HVBC filed its Petition for Reconsideration on December 2, 1983, seeking reconsideration of the staff action on two grounds: (1) based on consideration of terrain shielding, no interference to WKAS-TV would occur; and (2) since HVBC was required to move from Channel 70 due to land mobile interference, it should be given special consideration. HVBC's Petition for Reconsideration and supporting Engineering Statement were premised on the purported effects of "substantial terrain obstructions . . . between the translator location and the Ashland service area." The applicant's consulting engineer concluded that terrain barriers would obstruct line of sight reception of HVBC's signal in the Ashland area and would introduce a shadow loss of not less than 20 dB. Based on its own assumptions, the engineering statement opined that interference would not occur.

3. By letter dated February 19, 1984, the Mass Media Bureau staff denied HVBC's petition for reconsideration and returned its application again. The letter pointed out that the Commission had specifically rejected consideration of terrain shielding in adopting the low power television rules. It also pointed out that although applications to move from UHF Channels 70 through 83 are given special consideration, *i.e.*, they are excepted from the freeze on the filing of new or major change applications and often granted Special Temporary Authority ("STA") to operate on the new channel, they are not excused from compliance with the Commission's interference rules.

4. HVBC now seeks review based on its allegation that this case involves a question of law or policy which has not previously been resolved by the Commission. HVBC claims that "the full Commission has not ruled on whether actual calculations of height above average terrain along the complete radial between the transmitter site of the proposed station and the station to be protected should be used wherever possible."

5. However, the method of calculating height above average terrain was not raised on reconsideration and thus was not previously considered by the Bureau. Moreover, although HVBC claims that this issue is the basis of its Application for Review, the bulk of the discussion in its pleading deals with the use of terrain shielding to justify the proposed facilities. In fact, the only argument that HVBC makes concerning height above average terrain is the assertion that "in other services, the Commission has made it a policy to prefer actual field strength measurements and extended radial calculations over the assumptions made in predicted contours" and that "it would follow then that such should be the case in the area of low power television."

6. This assertion regarding Commission policy in other services is not supported in any way, since, in fact, it is not correct for television

broadcast services. *See Field Strength Curves*, 53 FCC 2d 855 (1975). The Commission noted that:

> we are not amending Section 73.686(a) in any way which would allow, as a matter of right, the determination of contour locations by means of field strength measurements. As we have discussed, the procedure, in the mind of many parties is of questionable validity, and, even if it were not, we do not believe that proceedings involving the television broadcasting service should be burdened with the mass of often conflicting showings which, in many cases, have so complicated standard broadcast proceedings. [*Field Strength Curves*, 53 FCC 2d at 869.]

7. The Commission's Rules clearly provide that, when calculating the height of the radiation center of the antenna above average terrain along pertinent radials between the transmitter site of the proposed station and the station to be protected, the elevations between 2 and 10 miles from the antenna site shall be employed. Section 73.684(d) of the Commission's Rules.[1] These calculations are used for contour determination in the low power television service as well as full-service television. Section 74.705(c) of the Commission's Rules details the information for calculating the field strength of a low power television or television translator station which is used to determine interference to a full-service television station. Section 74.705(c) states that the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) in the pertinent direction is used. Further, Sections 74.705(c)(1) and (2) provide that the F(50,10) charts and F(50,50) charts of Section 73.699 of the Commission's Rules shall be used to calculate field strength of the proposed station signal. To use the charts contained in Section 73.699, the HAAT on the radial in question must be determined using the elevations between 2 and 10 miles from the antenna site as outlined in Section 73.684 of the Commission's Rules. Use of an HAAT calculated on the terrain elevation along the entire 133.5-mile radial in question, as urged by HVBC, would invalidate the use of the charts in Section 73.699.

8. The policy proposed by HVBC entails a significant departure from the present provision of the Commission's Rules which would be more properly addressed in a rule making proceeding. An individual adjudicatory matter is not the proper forum for changing Commission rules or policy, especially when the proposed change is inadequately supported and documented.

9. Moreover, the Commission has previously considered the use of terrain shielding in evaluating low power television and television translator applications on two occasions. In the *Low Power Television Report and Order*, 51 RR 2d 476 (1982), the Commission noted that although it had originally proposed to consider terrain shielding, our

[1] Use of the 2 to 10 mile prediction method is always required by Section 73.684. In certain situations, full-service television applicants may provide a supplemental showing concerning contour distances as determined by other means.

experience with interim applications had demonstrated that it was far beyond our staff capacity to evaluate individually thousands of terrain shielding claims. The Commission declined to adopt any standard terrain correction factor based on the limited information it had before it.

10. Again, in the *Reconsideration of the LPTV Report and Order*, 53 RR 2d 1267 (1983), the Commission declined to consider terrain shielding in evaluating low power television and television translator applications and stated:

> Initially, we note that there is no universally accepted method of predicting the effects of terrain shielding. It would be beyond the scope of this proceeding to adopt a general terrain correction factor, even if we had sufficient information to enable us to do so. Under these circumstances, any attempt to allow for terrain shielding would embroil us in disputes that may not be susceptible to resolution by accepted standards and would therefore frustrate our efforts to expedite grant of low power licenses. [*Reconsideration*, 53 RR 2d at 1274.]

11. Finally, HVBC requests permission to file an amendment to its application, reducing output power, should its Application for Review be denied. HVBC contends that this amendment would eliminate the interference with WKAS-TV. However, HVBC's application was defective as initially filed and processed and was properly returned as unacceptable for filing. Our strict low power television and television translator processing standard does not allow reacceptance and reprocessing of defective applications after they have been returned as unacceptable. However, since HVBC is a television translator seeking to move from Channel 70 to a lower channel to avoid land mobile radio interference, it is exempt from the Commission's current freeze on the filing of new or major change applications. As stated previously, a request for STA will be favorably considered. Thus, HVBC may submit a new application at any time for any available channel in its area in compliance with the current Commission rules.

12. In view of the foregoing, IT IS ORDERED, that pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Holston Valley Broadcasting Corporation IS DENIED.

13. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of the *Memorandum Opinion and Order* by Certified Mail- Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Interconnection
Common Carrier, International Record Carriers
Telex

Commission rescinds existing prescriptions which have governed interconnection arrangements between and among domestic and international record carriers so that an intercarrier agreement can be implemented.

—*Interconnection Arrangements*
CC Docket No. 82-122

FCC 84-523

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Interconnection Arrangements Between and Among the Domestic and International Record Carriers	CC Docket No. 82-122

REPORT AND ORDER

Adopted: November 8, 1984; Released: November 15, 1984

BY THE COMMISSION:

I. Introduction

1. The Record Carrier Competition Act of 1981 (RCCA)[1] governs certain aspects of the provision of record communications services within the United States and between the United States and foreign points.[2] The major provisions of the RCCA govern the manner by which carriers interconnect their facilities and allocate revenues for the provision of record communications services. The majority of these provisions sunset on December 29, 1984.

[1] 47 U.S.C. § 222 (1981). Section 222 of the Act was rewritten by the RCCA.

[2] We have adopted a series of orders to implement the RCCA. The primary decision which implemented the RCCA was Interconnection Arrangements Between and Among the Domestic and International Record Carriers (Interim Order); 89 FCC 2d 928 (1982), *on reconsideration*, 93 FCC 2d 845 (1983), *rev'd in part sub nom.* Western Union v. FCC, No. 82-1502 (D.C. Cir. March 7, 1984).

2. On March 7, 1984, the United States Court of Appeals for the District of Columbia circuit rendered a decision[3] concerning our implementation of the RCCA. The Court reversed and remanded for further proceedings two aspects of our Interim Order.[4] On August 6, 1984 we issued a Further Notice of Proposed Rulemaking[5] to treat those issues remanded to us by the Court of Appeals. We reached tentative conclusions as to these issues and requested comment on our tentative conclusions.

3. In response to our Further Notice, the carriers filed an executed "Memorandum of Agreement" on September 27, 1984.[6] This negotiated agreement establishes terms and conditions regarding physical interconnection, billing, collecting and tariffing for telex services. The agreement formalizes the parties' respective obligations and undertakings in this regard. In addition, the carriers filed a "Supplemental Petition for Acceptance of Intercarrier Agreement." In this petition, the carriers request that we amend, revoke or waive our existing prescriptions so that the agreement may become operative prior to the statute's sunset date and continue until June 30, 1986. We note that the agreement by its terms became effective upon execution but that it contained a provision requiring Commission action on our existing prescription within forty-five days as a further condition.

4. In this Report and Order, we will summarize the statute, our Interim Order, other significant Commission orders, the Court's decision, our Further Notice and the intercarrier agreement. We will then set out our rationale for rescinding our existing prescriptions pre-sunset and permitting the implementation of this intercarrier agreement as proposed by the carriers. The intercarrier agreement is attached as Appendix A.

II. Background

5. The Statute: The RCCA, the majority of which sunsets pursuant to Section 222(e) on December 29, 1984, lifted the statutory bar on Western Union's provision of international services and permitted its re-entry into the international market.[7] It also facilitated the expansion of the

[3] Western Union Telegraph Company v. Federal Communications Commission *et. al.*, No. 82-1502 (D.C. Cir. March 7, 1984).

[4] As will be discussed in detail below, the Court reversed and remanded that part of our Interim Order designating the international carrier as the originating carrier on outbound calls from the United States and requiring the pro rata distribution of revenues received for a portion of inbound calls.

[5] Interconnection Arrangements (Further Notice of Proposed Rulemaking FCC 84-380 (released August 6, 1984).

[6] An unexecuted copy of this Agreement was filed on September 12, 1984, the date comments to our Further Notice were due.

[7] Section 222(d).

international record carriers (IRCs) into the domestic market.[8] In addition to encouraging the development of competition in the record communications services market, the RCCA requires carriers to interconnect their facilities upon terms and conditions which are just, fair, and reasonable.[9] The RCCA also requires the pro rata allocation of international inbound record service transmission,[10] interconnection between a carrier's domestic and international segments which is equal in type and quality and available at the same rates and upon the same terms and conditions as that furnished to an interconnecting carrier,[11] the establishment of a nondiscriminatory formula for the equitable allocation of revenues derived from interconnected transmissions,[12] and the establishment by each carrier of the total price charged to the public for any service originated by that carrier.[13] To implement these requirements, Section 222(c)(3)(A) required the Commission to convene, monitor and preside over interconnection negotiations between and among the domestic and international record carriers.[14] The RCCA also required the Commission to prescribe interconnection arrangements if the carrier negotiations failed to produce an agreement.[15]

6. The Interim Order: The carriers were not able to reach an agreement on the terms and conditions for interconnection within the forty-five and ninety day limits provided by the RCCA. Accordingly, the Commission, pursuant to the RCCA's mandate, conducted a rulemaking proceeding on an expedited basis and issued an interim Order establishing the necessary technical and financial arrangements for the provision of interconnected telex and TWX services. Arrangements were prescribed for purely domestic transmissions as well as for interconnected international inbound and outbound telex calls. In the Interim Order we designated the international carrier as the originating carrier for interna-

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[8] Id. After 1963 and prior to the passage of the RCCA, the provision of record communications services was bifurcated. Western Union dominated the domestic side but was prohibited under the old Section 222 from engaging in the direct provision of international record communications services. The international record carriers were authorized to provide service to overseas points through a limited number of gateway cities.

[9] Section 222(c)(1)(A)(i).

[10] Section 222(c)(1)(A)(ii).

[11] Section 222(c)(1)(B).

[12] Section 222(c)(2).

[13] Id.

[14] The Western Union Telegraph Company and Graphnet, Inc. participated in the interconnection negotiations as domestic record carriers. ITT World Communications Inc., RCA Global Communications, Inc., Western Union International, Inc., FTC Communications, Inc., TRT Telecommunications Corporation, International Relay, Inc., and CCI participated as primary existing international record carriers.

[15] Section 222(c)(3)(B).

tional outbound calls responsible for billing, tariffing and collection. We made no changes in the interconnection arrangements for international inbound transmissions and designated the carrier on whose network a purely domestic call was initiated as the originating carrier for billing, collecting and tariffing purposes. We prescribed revenue allocation formulas for international inbound traffic (the pro rata formula) and international outbound traffic (transiting arrangements). We also created a holding factor to compensate domestic carriers for holding and set up a time when international minutes are used to determine billable domestic minutes.[16] Further, we prescribed a 15% discount from the terminating carrier's intra-network tariffed charge for interconnected transmissions.

7. Subsequent Orders: Pursuant to our Interim Order, record carriers providing international and domestic service filed revisions to their tariffs purporting to establish the interconnection arrangements which we had prescribed. We found that these filings did not conform to our requirements as specified in the Interim Order and we rejected them.[17] We also took the unusual step of prescribing the specific tariff language needed to implement our Interim Order. In addition, we identified several technical matters which warranted further discussions among the carriers, the most important being the handling of store-and-forward transmissions and telex/TWX conversions. The carrier negotiations on these technical matters were not successful and we subsequently resolved these issues in our *Store-and-Forward-Decision.*[18] We have also released a number of additional orders relating to promotional telex rates, the distribution formula for unrouted outbound telegram traffic, telex traffic originated via teletext and private lines and the billing of overseas telex calls from ship customers of INMARSAT SERVICES.[19]

8. Court Decision: The following four aspects of our Interim Order were at issue in the case before the court: (a) whether the Commission erred in prescribing a 15% interim discount from a terminating carrier's publicly tariffed intra-network rate for an interconnected transmission; (b) whether the domestic or international carrier should be deemed the

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[16] In our Interim Order, we prescribed a 1.3 holding factor. Western Union raised this holding factor to 1.408 to compensate for an imbalance in billing minutes.

[17] *See* Interconnection Arrangements, (Rejection Order), FCC 82-264 (released June 11, 1982).

[18] *See,* Interconnection Arrangements, 93 FCC 2d 156 (1983). In the Store-and-Forward Decision order we addressed the treatment of store-and-forward interconnections and interconnection to forms of store-and-forward service where the output messages are not in the same form as the input messages. We concluded that many, but not all, of these store-and-forward offerings were enhanced services.

[19] *See* Western Union International, *et. al.* Transmittal No. 1628, released April 13, 1983; Western Union Telegraph Co., Transmittal No. 8026, released May 10, 1983; Western Union Telegraph Co., Transmittal No. 7992, released March 21, 1983; Communications Satellite Corporation, Transmittal No. 1037, released March 4, 1983.

originating carrier with the right to tariff, bill and collect; (c) whether the formula prescribed by the Commission for allocating revenues received for international outbound calls (transiting arrangements) is reasonable; and (d) whether the Commission had the authority to require that revenues received for international inbound calls, rather than traffic, be distributed pursuant to a pro rata formula between interconnecting carriers.[20]

9. On review, the D.C. circuit held that our decision to prescribe on an interim basis a 15% discount for interconnected transmissions from a terminating carrier's publicly tariffed intra-network rate was not reviewable. The court also affirmed our revenue allocation formula for the outbound transmissions of one carrier employing the facilities of another carrier on a transiting basis. However, the court reversed and remanded that part of our Interim Order designating the international carrier as the originating carrier on calls outbound from the United States and requiring the pro rata distribution of revenues received for a portion of inbound calls.

10. As to the originating carrier for outbound calls, the court stated in its holding that both the language and the legislative history of the statute indicated that the domestic carrier on whose network the call originates is the originating carrier and has the responsibility to tariff, collect and bill for the entire call. As to pro rata, the court stated that Congress' intent in enacting that provision was to require carriers to physically distribute a portion of international inbound traffic. The court saw nothing in the statute giving us authority to transform this traffic (service) distribution requirement into a revenue distribution scheme. The court concluded that if Congress' prescribed scheme to distribute traffic pro rata was unworkable, as we had determined, then the Commission must return to Congress and seek appropriate legislation.[21]

11. Further Notice of Proposed Rulemaking: In order to implement the court's holding on the originating/terminating issue, we recognized that it would be necessary for the record carriers to make operational, billing and tariff changes. To begin this process, we directed Western Union and all other originating carriers to submit information and an interconnection plan to demonstrate their technical ability to perform these functions. Public meetings were held under our aegis to discuss these proposals and establish a tariffing, billing and collection arrangement consistent with the court's decision. The carriers reached agreement

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[20] The pro rata, transiting, and originating/terminating holdings of the court interpreted sections of the RCCA which sunset on December 29, 1984.

[21] In view of its reversal of pro rata distribution formula for inbound calls, the court stated that we *may* want to modify our transiting formula.

on some aspects of a tariffing, billing and collection arrangement but were unable to reach agreement on others.

12. Since the carriers could not reach agreement on all the issues presented by the court, we issued a Further Notice of Proposed Rulemaking to treat the court's remand. We reached tentative conclusions with respect to pro rata distribution of revenues for international inbound calls, transiting arrangements for international outbound calls[22] and originating/terminating carrier.[23] Our tentative conclusions reflected the positions of the participants to the negotiations where an agreement had been reached.

13. Comments to our Further Notice were due on September 12, 1984. On that date, the carriers filed an unexecuted copy of a "Memorandum of Agreement." An executed copy of this agreement with an accompanying "Supplemental Petition for Acceptance of Intercarrier Agreement" was filed on September 27, 1984.[24]

14. The Agreement: The intercarrier agreement addresses two basic issues: (1) billing, collecting and tariffing arrangements for realtime outbound interconnected telex calls (originating/terminating issue) and (2) continuation of physical interconnection arrangements.

15. With respect to billing arrangements for an international outbound call, the agreement provides that the party providing the domestic segment service may bill for the domestic segment and that the international carrier may bill for the international segment. However, the agreement initially provides that the international carrier will bill on behalf of the domestic carrier as it does today using international minutes as the basis for its charges to users.[25] If the domestic carrier later decides

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[22] As for pro rata, we tentatively concluded that a pro rata distribution of traffic as found in Section 222(c)(1)(A)(ii) could not be implemented prior to the section's sunset. We also tentatively concluded that the transiting arrangements prescribed in our Interim Order should remain intact.

[23] We reached tentative conclusions regarding the following originating/terminating subissues: (1) format of the domestic carrier's bill; (2) treatment of bad debts; (3) continuation of the international carriers Early Payment Credit (EPC) programs; (4) protection of proprietary data against improper disclosure and use by competitors; (5) format of the magnetic tape to be provided to the domestic carrier by the international carrier; (6) treatment of non-billable calls; (7) date of settlements; (8) disavowed calls; (9) date of implementation; and (10) the carrier to bear the expenses incurred in altering current billing arrangements.

[24] The following carriers are signatories to the agreement. Consortium Communications International, Inc.; FTC Communications Inc.; Graphnet, Inc.; ITT World Communications Inc.; International Relay, Inc.; RCA Global Communications Inc.; TRT Telecommunications Corporation; The Western Union Telegraph Company; and Western Union International, Inc.

[25] Each party handling a call originating on a domestic network which is routed by a calling subscriber to an overseas point via another party's international network will separately tariff its individual segment charge applicable to such a call.

to bill and collect for its own services, it must give the international billing party 90 days notice to accommodate data processing and invoice processing charges. Thus, for at least the short term, the party providing the international service segment will continue to be the billing carrier and remain responsible for billing and collecting the domestic segment and the international segment charges.

16. With respect to the physical interconnection arrangements, the parties agree that they will not seek certification from us for any discontinuance of existing physical interconnection arrangements for domestic or international telex (including TWX) prior to July 1, 1986. The parties also agree that the terms and conditions (other than terms and conditions respecting rates, charges, or other compensation arrangements) governing physical interconnection of their respective domestic and/or international telex services (both realtime and store-and-forward) will continue to be reflected in tariffs filed with us and that any changes in these tariffs will be accomplished with other parties being given at least 90 days notice.

17. The parties also agreed either not to make changes until July 1, 1986 or to provide for a longer period of notice in some instances, and in other instances for close cooperation with other parties for the implementation of changes for the following specifically identified interconnection parameters: (1) grade of service; (2) interconnection trunks; (3) network configurations; (4) signalization changes; and (5) routing modifications.

18. The parties state their intention, in the supplemental petition filed with the agreement, that any carrier certificated by us to provide domestic or overseas telex or TWX services would be able to become a party to this agreement. The parties also indicate that network access codes, what we interpret to be the 107X arrangements, would be made available to new carriers.

19. With respect to transiting arrangements, the parties note that such arrangements are currently provided pursuant to their interconnection tariffs. The agreement contemplates the maintenance of such tariffed arrangements subject to the option of any party to amend such arrangements on 90 days notice to other parties.

20. The parties also agree to withdraw support for a petition for rulemaking filed by RCA Global Communications to extend under Section 201(a) of the Communications Act of 1934, as amended, certain features of the interconnection arrangements we prescribed in our Interim Order.

21. Finally, the parties make clear that nothing in this agreement is intended to address the appropriate division of charges between interconnected carriers for interconnected domestic, inbound international or outbound international telex traffic and that nothing in this agreement is to have any bearing on the resolution of any controversy involving such

division of charges. The parties reserve all rights to support or oppose any and all positions which may be offered or argued respecting any such controversy.[26]

III. Discussion

22. In order to permit the implementation of the intercarrier agreement, we will rescind our existing prescriptions prior to the sunset date. Since the interconnection arrangements specified in our *Interim Order* and *Store-and-Forward Order* were prescribed by us, we may amend these arrangements at any time when the circumstances warrant.[27] We also clarify that our prescriptions for record carrier interconnection arrangements would have terminated on the sunset date.[28] The carriers' agreement may extend beyond the sunset date without any further action by us. We believe that the conditions are now right to amend these prescriptions.

23. We believe that the intercarrier agreement filed by the carriers governs the terms and conditions of interconnection arrangements in a manner consistent with the RCCA. In enacting the RCCA, Congress intended that carriers negotiate their own interconnection agreement for the provision of through services. For example, Sections 222(c)(3)(A) and (B) provide a mechanism for carriers to negotiate their own interconnection arrangements. Section 222(c)(3)(C) provides a mechanism for additional carriers to elect to be subject to the terms of the previously established agreement. The Commission was to prescribe interim arrangements only if the carriers were unable to negotiate their own interconnection agreement. While the time originally established for entering into an agreement has passed, we believe that the carriers should be given the opportunity to implement this agreement. We note that if service is not provided under the terms of this agreement consistent with the public interest, we have continuing jurisdiction under Sections 201 and 203 as well as under those Sections of the RCCA which do not sunset to revisit this matter and prescribe any necessary arrangements.

24. We rescind our existing prescriptions so that the agreement may be implemented pre-sunset. The terms and conditions of the agreement

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[26] This issue is being dealt with in Phase II of Docket 78-97.

[27] *See*, e.g. In the Matter of Recording Devices in Connection with Telephone Services, 95 FCC 2d 848 (1983); In the Matter of Applications of GTE Satellite Corporation, 94 FCC 2d 1184 (1983).

[28] We have released orders which reach conclusions pursuant to sections of the RCCA which do not sunset and sections of the Communications Act other than Section 222. Although we have rescinded our prescriptions, we do not wish to revisit issues on which we have already spoken and which are based on non-sunsetting provisions. That is, although we are rescinding our prescription, the statutory interpretations that we have made for non-sunsetting provisions remain intact.

regarding the treatment of international outbound traffic appear to be consistent with the Act, the RCCA and the decision of the court. The agreement governs the terms and conditions of interconnection in a matter consistent with Sections 201 and 222 for the provision of a through service: interconnection of facilities with all other record carriers, interconnection between a carrier's domestic and international segments which is equal in type and quality as that furnished to an interconnecting carrier, retention of transiting tariffs, and provision of access codes. Consistent with the court's decision, the domestic carrier may perform billing, collecting and tariffing functions. The court's decision gave the domestic carrier the responsibility to tariff, collect and bill for the entire call and the domestic carrier, by this agreement, has delegated this responsibility to the international carrier.

25. In our Interim Order, we prescribed a holding factor to compensate domestic carriers in instances where international minutes were used as the basis for billing calculations. At that time, we prescribed a figure based on our estimates of network operations. However, carriers now have had approximately two years of operational experience and should be in a position to implement a more accurate holding factor. If international minutes continue to be used to calculate billable domestic minutes and if a domestic carrier desires to be compensated on the basis of a holding factor, then we shall require such a domestic carrier to file a tariff revision indicating what holding factor it proposes to employ and providing support for this factor in accordance with our rules.

26. In our *Store-and-Forward Decision* we indicated that store-and-forward technology could be utilized to provide both basic and enhanced services. In addition to recognizing that some basic store-and-forward services were within the ambit of the RCCA, we also concluded that certain enhanced store-and-forward offerings which were "traditional" record communication services should be treated under the RCCA as a limited exception to our *Computer II* decision. We concluded that these enhanced store-and-forward services should be tariffed until the RCCA's sunset date, and that interconnection should be established to traditional record communication services regardless if they were basic or enhanced. We affirm those conclusions here: enhanced service offerings should be detariffed, but interconnection to the traditional record services under non-sunsetting provisions of the RCCA should remain intact. This appears to be consistent with the terms of the carrier's agreement.

27. With respect to the post-sunset period, the intercarrier agreement appears to be consistent with the statutory intent and with those provisions of the RCCA which do not sunset on December 29, 1984. Furthermore, our *Interim Order* and subsequent orders make clear that the interconnection arrangements prescribed by us were temporary and

were to terminate at the sunset date.[29] There is no reason why the carrier's agreement cannot continue according to its terms past the sunset date.

28. Accordingly, IT IS ORDERED, that our existing prescriptions in Docket 82-122 are rescinded so that the agreement may be implemented prior to December 29, 1984.

29. IT IS FURTHER ORDERED, that if any carrier wishes to retain a holding factor for billing purposes it must file a tariff revision in accordance with our rules supporting such a factor on January 4, 1985 effective February 1, 1985.

30. IT IS FURTHER ORDERED, that carriers shall file tariff revisions relating to the offering of enhanced store-and-forward services consistent with this order on February 1, 1985 effective on 35 days notice.

31. IT IS FURTHER ORDERED, that pursuant to Section 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 403(1970), that the inquiry into the above-captioned matter initiated on August 6, 1984 is TERMINATED.

32. IT IS FURTHER ORDERED, that the Petition for Rulemaking filed by RCA Global Communications IS DISMISSED.

33. IT IS FURTHER ORDERED, that this order be printed in the Federal Register.

34. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354) IT IS CERTIFIED, that Sections 603 and 604 of that Act do not apply because this Report and Order will not have a substantial economic impact on a substantial number of small entities. *See* 5 U.S.C. §605(b) (1980 Supp.). The primary economic impact of this order will be upon carriers, not users.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[29] *See*, Interim Order, 89 FCC 2d at 929 (1982).

Appendix A

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Interconnection Arrangements Between and Among the Domestic and International Record Carriers	CC Docket No. 82-122

SUPPLEMENTAL PETITION FOR ACCEPTANCE OF INTERCARRIER AGREEMENT

On September 12, 1984, the undersigned U.S. record carriers submitted to the Commission an agreement among themselves governing future interconnection arrangements, and requested that the Commission permit the early implementation of those arrangements. In order to submit that Agreement as the principal response of those carriers to the Commission's *Further Notice of Proposed Rulemaking* in the above-captioned matter, it was necessary to file an unexecuted copy of the Agreement to meet the Commission's filing date for such responses. The carriers represented that they would submit a fully executed copy of the Agreement to the Commission at the earliest practical date. Accordingly, they are herewith submitting that fully executed copy for filing with the Commission.

Following the initial filing of this Agreement, the carriers have been informally advised by the Commission's Staff that certain clarifications of their intentions with respect to the operation of this Agreement would be desirable as an aid to the Commission's review of the interconnection arrangements proposed therein. These carriers are therefore submitting this Supplemental Petition in an effort to address those questions.

As an initial matter, we note that the September 12 Petition respecting this Agreement sought the Commission's "approval" of the Agreement. The Staff has pointed out that the Commission ordinarily does not "approve" private agreements entered into among parties subject to its jurisdiction.

To clarify our intent in this regard, we note that certain Commission actions are necessary in order to permit the Agreement to be implemented. As reflected in Paragraph C.5. of the Agreement, an essential external condition which must be satisfied for the Agreement to become effective is an early action by the Commission to permit its implementation, in accordance with its terms. Such FCC action must include an appropriate amendment of existing prescriptions to permit revised interconnection arrangements for outbound international telex traffic to be implemented immediately and a declaration that no otherwise continuing prescription of physical interconnection arrangements would remain in effect after December 30, 1984 — the latter declaration being required so as to recognize that the Agreement would reflect the sole definition of interconnection arrangements required among the Parties for the eighteen month period following the sunset of the Record Carrier Competition Act.

It was the apparent requirement for such changes in existing Commission prescriptions necessary to the implementation of this Agreement that motivated the Parties' request for approval of that Agreement. However, upon review of the original Petition, the carriers believe that this intent is reasonably clear from the overall tenor of the Petition and that a substitution of the term "acceptance" for the term "approval" (or "accept" for "approve")

wherever such terms appear would more closely comport with the relief which they are seeking from the Commission. Accordingly the carriers request that the Commission treat this Supplemental Petition as so amending their original Petition.

The Staff has also inquired as to the Parties' intent with respect to interconnection arrangements for new carriers which are not parties to the Agreement. As indicated in the original Petition respecting this Agreement, the only other carrier known to the Parties to have a potential interest in the interconnection arrangements contemplated by that Agreement was involved in the discussions leading to the Agreement. However that carrier, Puerto Rico Communications Authority, declined to sign the Agreement at this time because it does not have any current international authority, and believes that its existing agreements with other carriers are adequate for its domestic interconnection arrangements. There is no question, however, but that PRCA will be able to become a party to the Agreement at a future date if it so wishes. Similarly, the Parties intend that any other carrier certificated by the Commission to provide domestic or overseas telex or TWX services would be able to become a party to the Agreement. Furthermore, the Parties intend that network access codes would be made available to new carriers, subject to technical limitations inherent in the existing switching equipment and numbering plans for each of the Parties and to such future Commission orders (if any) not inconsistent with the Agreement, respecting access codes.

In addition, the Staff has inquired as to the Parties' intent as to continued maintenance of overseas transit arrangements for other record carriers. The Parties note that such transit arrangements are currently provided pursuant to their interconnection tariffs, and that the Agreement contemplates the continued maintenance of all such tariffed arrangements, pursuant to Paragraph B.2., subject to the option of any Party to amend such tariffed arrangements on 90 days notice to other parties.* In the event that a change in such transit arrangements were proposed by a Party, the Commission would have an adequate opportunity to respond to such a proposal through its normal tariff review process.

For the reasons set forth hereinabove, and in the Petition accompanying the September 12, 1984 filing of this Agreement, the undersigned Parties respectfully request that the Commission accept this Agreement and permit its implementation in accordance with its terms at the earliest reasonable date.

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* The Staff has also noted that the 90-day notice provided for in the Agreement may exceed the notice period required under the Commission's rules for such tariff filings. While the Parties would prefer the administrative convenience of a single 90-day filing for other Parties and the Commission, they will undertake to provide the initial 90-day notice only to other parties, with a subsequent FCC filing on the date for normal notice under the Commission's rules if the Commission objects to receiving such filings at an earlier date.

Respectfully submitted,
CONSORTIUM COMMUNICATIONS
INTERNATIONAL, INC.

By /s/ Robert Clifton Burns

Robert Clifton Burns

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By /s/ H. Richard Juhnke

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1828 L Street, NW
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WESTERN UNION INTERNATIONAL, INC.

By /s/ Robert Michelson

Robert Michelson

Its Attorney

1133 19th Street, NW
Washington, DC 20036

Dated: September 27, 1984

MEMORANDUM OF AGREEMENT

Representatives of the undersigned U.S. Record Carriers participated in a number of meetings over the past several months concerning implementation of a recent appellate decision which construed the Record Carrier Competition Act of 1981 as providing the domestic carrier on whose network an interconnected through outbound international telex call was initiated with the rights under that statute of an "originating carrier" (*Western Union Telegraph Co.* v. *FCC*, 729 F. 2d 811, D.C. Cir., 1984), and looking toward a possible agreement as to continued physical interconnection arrangements for telex services beyond the sunset date of the Record Carrier Competition Act. Those discussions were initially conducted under the aegis of the Federal Communications Commission (FCC or Commission) staff and, after failing to conclusively resolve all relevant concerns during that phase of the discussions, continued through private negotiations among various of those carrier parties. Those parties have collectively reached an agreement which satisfactorily accommodates their various concerns as to the appellate court ruling and the continuation of physical interconnection arrangements for domestic and international telex services beyond the sunset date, and believe that such arrangements will be in the public interest. This Memorandum of Agreement is a means of formalizing the parties' respective obligations and undertakings.

The parties affirmatively state that nothing in this Agreement is intended to address the appropriate division of charges between interconnected carriers for interconnected domestic, inbound international or, except as may be inconsistent with the specific terms of Section A hereof, outbound international telex (including TWX) traffic (which "division of charges" is inclusive of any charges established by the FCC in CC Docket No. 82-122 for the "termination" of such interconnected traffic), and that nothing in this Agreement, including the Agreement in its entirety or the making of the Agreement by the parties, shall have any bearing on the resolution of any controversy involving such division of charges, including any controversy as to the scope, extent, or continuing effect, if any, beyond the sunset of the Record Carrier Competition Act of the Commission's prescription of any such division of charges. The parties reserve all rights to support or oppose any and all positions which may be offered or argued respecting any such controversy.

With the foregoing caveat, the undersigned parties agree as follows:

A. Interconnection Principles and Billing Arrangements for Real Time Outbound Interconnected International Telex Calls

1. Each party which handles a call originating on a domestic network and which is routed by the calling subscriber, on a real time basis, to an overseas point via another party's international network will separately tariff its individual segment charge applicable to such a call.

2. The end user will be billed the sum of the domestic segment charge and the international segment charge by the party providing the international segment, with such party acting on behalf of the party providing the domestic segment for the billing of that segment charge; the party providing such billing service will show on its bill the total charge to the end user (i.e., the sum of the domestic and international segment charges), and may, as well, provide a basis for the user to determine the separate segment charges.

3. A party providing domestic segment service may choose to bill that domestic segment itself, rather than having that charge billed in its behalf by the party providing the corresponding international segment service. In that event, 90 days' notice to the billing party will be required in order to accommodate data processing and invoice processing changes.

4. The parties acknowledge that, as part of the consideration for this Agreement, the billing party is waiving any right to recover compensation for the provision of billing services to another party and that no compensation for the provision of such services is provided for in the interconnection arrangements contemplated by this Agreement.

5. At all times during which a party providing a domestic segment service elects billing of that service by the party providing the corresponding international segment service, the domestic segment charge will be expressed in "international minutes".

6. In instances where a party providing a domestic segment service elects billing of that service by the party providing the corresponding international segment service, the billing party agrees to remit amounts owed to the other party within 60 days after the end of the month in which the traffic is carried. Such amounts owed to the other party shall be specified in an invoice presented by that other party to the billing party. Such invoice shall be based either on data furnished by the billing party pursuant to Paragraph 7 or, in the absence of such data, on the other party's estimate of such aggregate charges. The billing party will be liable for a late payment charge at the rate of 1.25 percent per month on any amount so invoiced by the other party which is not received by that party within the 60-day period specified above.

7. Consistent with existing practices among the parties, a party providing billing service to another party will provide that other party with a monthly report as to aggregate minutes and charges billed on its behalf.

8. Each party shall bear the burden of any revenue loss attributable to bad debts or disavowed calls for charges associated with its particular segment offering. In this connection, when a party providing domestic segment service elects billing of that service by the party providing the corresponding international segment service, the parties stipulate that 2.75 percent of the sums billed on behalf of the party providing domestic segment service shall constitute a reasonable estimate of the total revenue loss attributable to bad debts and disavowed calls associated with the domestic segment service. In the event the billing party seeks to recover more than the stipulated allowance in any particular month from the other party, it shall provide the other party with documentation demonstrating the actual revenue losses;

provided, however, that any individual bad debt (including debts attributable to bankruptcy) which exceeds $4,000 in domestic segment charges for a given month shall be recoverable by the billing party from the other party over and above its recovery of the stipulated amount, with documentation required only as to that specific customer bad debt.

9. The parties agree not to oppose a special permission application to the FCC by any other party seeking permission to file tariffs implementing the terms of Section A of this Agreement on 30 days' notice. The parties stipulate that nothing in the Communications Act of 1934, as amended, or any FCC order thereunder, precludes the filing of any such tariff; provided, however, that the foregoing shall not preclude any party from challenging the level or structure of rates embodied in such tariff filing as being unjust, unreasonable, unjustly discriminatory, or otherwise unlawful under the Communications Act or Rules and Regulations adopted thereunder by the FCC.

B. Continuation of Physical Interconnection Arrangements

1. The parties stipulate that, under Section 214(a) of the Communications Act and the applicable Regulations thereunder, any discontinuance (other than temporary, emergency or partial discontinuance, as provided for in Section 214(a)) of existing physical interconnection arrangements for domestic or international telex (including TWX) services can be accomplished only after certification by the FCC that the present and future public convenience and necessity would be served by such a discontinuance, and they agree that no party will seek certification from the FCC for any such discontinuance prior to July 1, 1986.

2. The parties further agree that the terms and conditions (other than terms and conditions respecting rates, charges, or other compensation arrangements) governing such physical interconnection of their respective domestic and/or international telex services (both real-time and store-and-forward) will continue to be reflected in tariffs filed with the FCC, and that any changes in such terms and conditions, except as may be specifically addressed in Paragraph 3, will be accomplished only through amendments to such tariffs, with other parties being given at least 90 days' notice of any such amendment to such tariffs, and with any such notice not being given earlier than January 1, 1985; provided, however, that the parties agree to maintain, for the term of this Agreement, the existing allocation of billing responsibility for interconnections provided pursuant to the Store and Forward Order in CC Docket No. 82-122; and provided further that, should the FCC determine not to accept the continued maintenance of such interconnection terms and conditions through tariffs filed by the parties, the parties will enter into an agreement which establishes substantially the same obligations, one to another, as would have been reflected in the tariffs contemplated by this paragraph.

3. For certain specifically identified interconnection parameters, the parties agree either not to make any change through June 30, 1986, or to provide for a longer period of notice and/or close cooperation with other parties for implementation of such changes. Those specific interconnection parameters are:

a. *Grade of Service* - No change in current standard of .01 grade of service.

b. *Interconnection Trunks* - Any reduction in number of interconnection trunks shall be accomplished through mutual agreement as to the number and designation of such trunks.

c. *Network Configurations*

i. Any network reconfiguration by a party requiring changes in interconnection locations shall be without cost to other parties and shall preserve existing internetwork charging arrangements; such reconfigurations will require at least six months' notice to other parties.

ii. Any network reconfiguration which would be transparent to other parties but require testing by those other parties will require at least 90 days' prior notice of such a testing requirement.

d. *Signalization Changes* - Any signalization change requested by a party on existing terminations shall be accomplished on at least 90 days' prior notice, if the new signalization is a standard CCITT Rec. U.1 Type A, Type B, or Rec. U.11 Type C/Table 1. Any signalization change which would require software changes by other parties will be subject to mutual agreement of the affected parties, including without limitation the timeframe for such changes; the parties to such agreement will make good faith efforts to implement it in accordance with its terms.

e. *Routing Modifications* - Any routing modification which would require other parties to substantially modify existing network routing (e.g., routing change from west coast to east coast) will require at least 90 days' prior notification.

Alternatively, the parties may agree that any of the changes identified above would only be made after "reasonable notice" to other parties, taking into account particular circumstances related to the specific change contemplated and general industry practice respecting changes of that sort, along with a commitment for mutual cooperation.

4. No party will voluntarily take any action requiring a change in existing access codes for access from its subscribers to the networks of other parties; in the event a party is required to make such changes in access codes by legislative, judicial, or regulatory directive, that party will make its best efforts to assure that assignment of new access codes recognizes and accommodates existing market identities of other parties.

C. General Undertakings and Reservations

1. This Agreement shall become effective upon execution and shall remain in effect through June 30, 1986, unless nullified as provided in Paragraph 5.

2. Each party to this Agreement which elects, or has elected, to include a late-payment charge in its telex interconnection tariffs on file with the FCC with respect to amounts due from other carriers for handling inbound international interconnected telex traffic and domestic interconnected telex traffic shall, within 15 days of the release of a final order of the FCC accepting this Agreement, file revisions to such tariffs to provide that such a charge may not exceed 1.25 percent per month and will apply only to amounts not received within 60 days after the end of the month in which the traffic is carried or 30 days after the date of rendition of the bill, whichever is later.

3. To the extent that § 222 (c)(1)(B) of the Communications Act of 1934, as amended, may be interpreted as being inapplicable to the interconnection arrangements contemplated by Section A of this Agreement, the parties stipulate that they will continue to be bound by the "equal treatment" provisions of § 222 (c)(1)(B) for such arrangements during the period covered by this Agreement.

4. The parties intend that the existing FCC prescription of physical interconnection arrangements for record services shall not continue after December 29, 1984 and that this agreement shall govern such interconnection arrangements as provided herein. The parties agree to withdraw support (wherever given) for a petition, dated April 5, 1984, filed by RCA Global Communications, Inc. contemplating a further order by the FCC respecting interconnection arrangements among the parties, and to seek termination of any further action by the FCC in connection with that petition. The parties further agree not to seek any action of the

FCC which contemplates a further prescription of existing physical interconnection arrangements that would take effect prior to the termination of this Agreement; provided, however, that the requirements of this paragraph are not intended to limit in any way a party's right to oppose an effort by another party, whether by tariff filing or otherwise, or any similar action proposed by the FCC, to substantially alter the existing division of charges for interconnected traffic, or the relationship between such division of charges and a carrier's charge to the public for totally intra-network service; provided further that parties retain their rights under § 201(a) of the Communications Act of 1934, as amended, to seek interconnection arrangements in other circumstances not covered by this Agreement; and provided further that nothing in this Agreement shall constitute a waiver of any argument that existing physical interconnection arrangements are in compliance with applicable tariffs or shall preclude any party from filing a complaint before the FCC seeking interconnection as prescribed by applicable tariffs.

5. This Agreement shall be submitted to the FCC promptly upon execution and shall become null and void in the event that the Commission has not, within 45 days after its execution:

(a) permitted its implementation, without modification, by, *inter alia*, issuing an order amending, waiving or revoking the Commission's Interim Order and Tariff Prescription Order in CC Docket No. 82-122, and any other order deemed by the Commission to bar implementation of this Agreement, to the extent necessary to effectuate this Agreement (taking into account the parties' intent that this Agreement does not address any matters, or affect any positions, related to divisions of charges for the handling of interconnected traffic) between that time and December 29, 1984; and

(b) declared that no otherwise continuing prescription of record carrier interconnection arrangements (other than as to divisions of charges for the handling of interconnected traffic) shall remain in effect on and after December 30, 1984 — it being the intent of the parties that the arrangements established pursuant to this Agreement shall replace and supersede all previously prescribed physical interconnection arrangements (including, specifically, those contained in the Interim Order, the Tariff Prescription Order and the Store and Forward Order in CC Docket No. 82-122), and the parties having hereinabove agreed that this Agreement (as well as any Commission action with respect thereto) is in no way intended to affect the division of charges which have previously been prescribed or otherwise established for the handling of interconnected traffic, and have reserved all positions with respect to such charges.

IN WITNESS WHEREOF the undersigned Parties have executed this Memorandum of Agreement this 25th day of September, 1984.

CONSORTIUM COMMUNICATIONS
INTERNATIONAL, INC.

By _____

Yaakov Elkon
President

FTC COMMUNICATIONS, INC.

By _____

Roger P. Newell
Vice President

GRAPHNET, INC.

By _____

Stanford B. Weinstein
Vice President

ITT WORLD COMMUNICATIONS INC.

By _____

John O'Boyle
Vice President

INTERNATIONAL RELAY, INC.

By _____

Steven Geiger
President

RCA GLOBAL COMMUNICATIONS, INC.

By _____

Lawrence M. Codacovi
Executive Vice President

TRT TELECOMMUNICATIONS CORPORATION

By _____

Roderick A. Mette
Vice President

THE WESTERN UNION TELEGRAPH COMPANY

By _____

John W. Pope, Jr.
Vice President

WESTERN UNION INTERNATIONAL, INC.

By _____

Sergio Wernikoff
Sr. Vice President

Application, Acceptance of
Application, Defective
Application, Resubmission
Television, Low Power

Application for review denied. Low power TV applications which are not complete and sufficient will not be accepted for filing. An application which is found to cause interference to an existing TV translator station is defective and unacceptable for filing. An application which has been returned as defective cannot be accepted *nunc pro tunc* if resubmitted with an amendment to correct defect. —*Kinetications, Inc.*

FCC 84-454

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Kinetications, Inc. For a Construction Permit for a New Low Power Television Station on Channel 67 Atlanta, Georgia	File No. BPTTL-810218IK

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: September 28, 1984

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed November 23, 1983, by Kinetications, Inc. ("Kinetications"), of an action by the Mass Media Bureau staff, denying Kinetications' Petition for Reconsideration and returning the above-captioned application.

2. Kinetications submitted its application on February 18, 1981 and it was returned by the Low Power Television Branch on July 22, 1983. The return was necessitated because Kinetications' proposed facility would cause objectionable interference to television translator station W67AH, Hiawassee, Georgia, in violation of low power television interference standards found in Section 74.707 of the Commission's Rules, 47 CFR

§74.707(1983). Public Notice of this action was given in Report No. 18851, page 9, released August 5, 1983.

3. Kinetications filed its petition for reconsideration on September 6, 1983, together with a minor change amendment which proposed a new antenna of lower gain to correct interference to W67AH.[1] Kinetications argued that its application should be reinstated with the perfecting minor amendment because its original application met the completeness standard for low power television and television translator applications found in Section 73.3564 of the Commission's Rules, 47 CFR §73.3564 (1983).[2] Specifically, Kinetications contended that while our Report and Order announcing the final rules for the low power television service, *Low Power Television Report and Order*, 51 RR 2d 476 (1982) (*"LPTV Report and Order"*), purported to establish a letter perfect application acceptance standard, the language of the adopted rule indicates that applications will be accepted for filing if all forms are filled out, all relevant questions are answered and all exhibits are provided. Kinetications contended that its application met that standard and was thus improperly returned. Kinetications' petition was denied and its application was returned on the ground that the letter perfect standard was embodied in the language of Section 73.3564, and that standard mandated the return of any application which was defective because it did not meet the low power television predicted interference standards. Kinetications' amendment was also returned as ineffective since, under that standard, an application which has been returned and is no longer on file cannot be reinstated by the submission of a correcting amendment.

4. In its application for review, Kinetications reiterates its contention that the proper interpretation of the low power television application processing standard would not require the return of an application if that application was completely filled out. Kinetications further contends that only applications with blatant defects are to be returned, and an engineering proposal which would cause interference to an existing translator and could be corrected by a minor amendment is not a defect which renders the application unacceptable under the Commission's Rules.

5. Contrary to Kinetications' arguments, the Commission did adopt a standard which requires applications to be letter perfect when submitted. The adoption of such a standard is permissible. *See Radio Athens, Inc.*

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[1] This amendment would be classified as a minor change in facilities under Section 73.3572(a)(1), 47 CFR §73.3572(a)(1)(1983), since it did not increase the proposed signal range of the facilities in any horizontal direction.

[2] Section 73.3564(a) of the Commission's Rules provides in part, "In the case of low power TV and TV translator applications, those found to be complete are accepted for filing . . . [L]ow power TV and TV translator applications that are not complete will be returned to the applicant."

(WATH) v. FCC, 401 F.2d 398 (D.C. Cir. 1968); *LPTV Report and Order, supra*, at 501-502. The Commission clearly gave notice that it was departing from the substantially complete standard set forth in *James River Broadcasting Corp. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), and would require strict compliance with the new acceptability standards, stating, "Defective low power applications will be returned summarily, and if they are resubmitted with perfecting amendments, they will be placed at the end of the processing line, unless passage of a cut-off date precludes consideration altogether, in which case the application will be returned." *LPTV Report and Order, supra*, at 502. Kinetications' application was defective because its application would cause interference to an operating television translator station, and therefore was not in compliance with the Commission's low power television interference rules. The Commission has never been obliged to keep on file applications which cannot be granted and do not meet the relevant processing standard. See, *e.g., Radio Athens, supra*, at 401. Further, Kinetications' argument fails to consider Section 73.3566 of the Commission's Rules, which provides in part, "Applications which are determined to be patently not in accordance with the FCC rules, . . . , will be considered defective and will not be accepted for filing." Since Kinetications' application was in patent violation of the Commission's interference rules, it could not have been accepted for filing, and was properly returned.

6. Moreover, Kinetications' submission of a minor amendment to correct this interference problem cannot be accepted to reinstate the application. Perfecting amendments to returned applications are not allowed since this practice would substantially delay the processing of all pending LPTV and television translator applications. The Commission simply cannot afford to give applicants repeated opportunities to file a complete and sufficient application. "The Commission's limited resources and the large number of low power applications simply will not permit the staff to coach applicants in correcting defects or omissions in applications that have been filed, as sometimes has been the case in the past." *LPTV Report and Order, supra*, at 502. Because of the contour overlap protection criteria used in processing low power television and television translator applications, one application can directly or indirectly affect hundreds of other applications in a daisy chain effect. Thus, the staff must be able to make an initial determination whether an application is complete and sufficient in order to expedite processing. If defective applications were allowed to be reinstated due to corrective amendments, the potential delay and disarray to hundreds of other applications would be devastating. Additionally, each change in information contained in an application or addition of a returned application requires modifications to the engineering and/or directional antenna data bases and additional

computer studies and staff analyses to determine mutual exclusivity with other pending applications. Later amendments to correct defects require the staff to process each application two or more times. Repeated processing will more than double the processing time for all pending applications, not just the application amended. With approximately 30,000 pending low power television and television translator applications, repeated processing of applications and additional delays in processing are not acceptable and do not promote the public interest in receiving prompt service.

7. Based on the foregoing, we believe that the Bureau fully considered and properly decided the matter. Consequently, Kinetications' application for review will be denied.

8. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the application for review filed by Kinetications, Inc., IS DENIED.

9. IT IS FURTHER ORDERED That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail - Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Diversification, of Control of Mass Media, See Also Control
Ex Parte, Prohibited Presentations
Financial Qualifications
Ownership and Management, Integration of
Public Files Availability of

In hearing matter of mutually exclusive CP applications for new television station in Riverside, California, Review Board affirmed ALJ's grant. Integration proposals of two applicants, which are based on gifts of stock, are not credited. The case, itself, however, turns on integration criterion and is razor thin close. The only other preference awarded (a very slight one) is on diversification. No demerit is imposed on a public file issue; and the Board refused to add an ex parte issue.

—*KIST Corp.*

BC Docket No. 81-863

FCC 84R-74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KIST Corp. Riverside, California	BC Docket No. 81-863 File No. BPCT-810717KK
Ettlinger Broadcasting Corporation Riverside, California	BC Docket No. 81-866 File No. BPCT-810720KK
Sunland Communications Company Riverside, California	BC Docket No. 81-867 File No. BPCT-810720KL
Bethel Broadcasting, Inc. Riverside, California	BC Docket No. 81-868 File No. BPCT-810720KM

Channel 62, A Limited Partnership Riverside, California	BC Docket No. 81-869 File No. BPCT-810720KN
Riverside Family Television, Inc. Riverside, California	BC Docket No. 81-870 File No. BPCT-810720KO
United American Telecasters, Inc. Riverside, California	BC Docket No. 81-871 File No. BPCT-810720KQ

For a Television Construction Permit

Appearances

James E. Greeley and *T. Michael Jankowski* on behalf of KIST Corp.; *Daniel W. Toohey, John R. Feore, Jr.*, and *Todd D. Gray* on behalf of Sunland Communications Company; *A. Thomas Carroccio* on behalf of Bethel Broadcasting, Inc.; *Jonathan D. Blake* and *Jonathan L. Wiener* on behalf of Riverside Family Television, Inc.; and *Seymour M. Chase* and *Robert A. Zauner* on behalf of United American Telecasters, Inc.

DECISION

Adopted: October 15, 1984; Released: October 19, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of KIST Corp. (KIST), Ettlinger Broadcasting Corporation (Ettlinger), Sunland Communications Company (Sunland), Bethel Broadcasting, Inc. (Bethel), Channel 62, a Limited Partnership (Channel 62), Riverside Family Television, Inc. (Family), and United American Telecasters, Inc. (United) for authorization to construct a new television station in Riverside, California to operate on Channel 62.[1] By *Hearing Designation Order* (*HDO*), 46 Fed. Reg. 62936, published December 29, 1981, the

[1] Applications by Riverside Telecasters, Inc., Pan-Pacific Broadcasting, Inc. and Focus Broadcasting of Riverside Inc. were dismissed by the presiding Administrative Law Judge pursuant to each applicant's request. *Order*, FCC 82M-1373, released April 28, 1982; and *Order*, FCC 82M-2471, released August 13, 1982.

applications were designated for consolidated hearing on various qualifying issues and on the standard comparative issue. Additional issues were subsequently specified by presiding Administrative Law Judge (ALJ) Joseph Chachkin. *Order*, FCC 82M-1645, released May 24, 1982. In an *Initial Decision* (*I.D.*), FCC 83D-60, released November 4, 1983, the ALJ initially disqualified Ettlinger, Channel 62, and United on qualifying issues and selected Sunland as the winning applicant based on its comparative superiority on the integration of ownership and management criterion over the remaining qualified applicants, KIST, Bethel, and Family.

2. The proceeding is now before the Review Board on exceptions filed by all of the losing applicants (except Ettlinger and Channel 62[2]) and on limited exceptions filed by Sunland. United devotes most of its brief and exceptions to its disqualification under a financial issue while the other applicants concentrate their exceptions on the ALJ's findings under the integration criterion. Additionally, the parties have filed contingent petitions to enlarge issues against United and KIST. We have reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held on March 30, 1984, the underlying record, and the contingent petitions to enlarge issues as well as the material proffered herein by the parties. We adopt the findings of fact in the *I.D.* except as specifically modified herein, but reverse certain of the ALJ's dispositive conclusions and hold that a grant of KIST's application would best serve the public interest. Before addressing the integration findings, on which the case ultimately turns, we will first turn to the only qualifying issue still contested, the financial issue against United.

3. *Financial Qualifications: United.* The Commission's *HDO* specified a financial issue against United based on various deficiencies in United's application financial showing. *See HDO*, paras. 18-19. Thereafter, in response, United amended its financial proposal on September 1, 1982, whereby it would rely on deferred equipment credit of $877,500 and a $2 million loan from the West Olympia Bank (then named Bank of Finance) to finance its estimated construction and three-month operation costs of $2,182,550. Its amendment was accepted by *Order*, FCC 82M-2786, released September 14, 1982. The deferred equipment credit aspect was not contested at hearing. Of interest, however, was a West Olympia Bank letter which expressly stated that the bank was willing to syndicate loans with its correspondent banks to extend to United a loan up to $2 million. United Exh. 1, Attachment A. Three witnesses testified at hearing on behalf of United concerning the purported loan: Mr. Jong Tae Kim,

[2] Because Ettlinger and Channel 62 did not file exceptions to the Initial Decision, their respective applications will be dismissed with prejudice for failure to prosecute pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR §1.276(f).

Executive Vice President of the West Olympia Bank, member of the bank's Senior Loan Committee, and signatory of the letter (Tr. 3235-3237); Mrs. Woo-Chang Lee England, a Vice President of the bank, loan officer, and because of Mr. Kim's difficulties with the English language, editor of the above bank letter (Tr. 2307-11); and Mr. Goon Suk Han, a director and member of the Senior Loan Committee of the West Olympia Bank (Tr. 2442-43). Mr. Han is also a director and a twenty-five percent shareholder in the United applicant (Tr. 2442).

4. In his decision, the ALJ concluded that the bank letter could not be credited as establishing United's basic financial qualifications. *See I.D.*, paras. 136-137. He observed that the proposed loan was well-beyond the legal lending limit of the West Olympia Bank ($150,000 to $160,000 unsecured loans; $300,000 for secured loans, *see id.*, para. 19), and that in the absence of any showing that other banks would be willing to participate in the loan, there was no reasonable basis for concluding that the West Olympia Bank would be able to make the full loan in question to United. *Id.*, para. 136. He therefore concluded that United was not financially qualified. *Id.*, para. 137.

5. Exceptions have been filed on this issue by United and "limited" exceptions filed by Sunland and KIST. In its exceptions, United challenges its disqualification, arguing first that the standard utilized by the ALJ of requiring an applicant to show a willingness on the part of the correspondent banks to make the loans goes beyond the Commission's standard; and, second, that the testimony by the aforementioned witnesses removes all doubt that United had reasonable assurance of the availability of the bank loan. Sunland and KIST, on the other hand, argue that the ALJ erred in not providing two alternative bases for rejecting United's proffered bank loan; *i.e.*, the applicant's failure to satisfy the pertinent collateral requirements or to provide the bank with the requisite financial information.

6. In addition to the matters indicated above, new developments, which it is argued have an impact on the financial qualifications of United, have come to our attention. Specifically: (1) Family filed, on December 29, 1983, a contingent petition to enlarge and to reopen the record, contending that two United principals, Andrew and Rachel Kimm filed a Chapter 13 bankruptcy petition on July 13, 1983 with the United States Bankruptcy Court, Central District of California. Family therefore seeks the addition of reporting, candor, and legal qualifications issues against United. (2) On December 30, 1983, Sunland filed a contingent motion to reopen the record and to enlarge the issues, asserting that United's former counsel sued United and its individual shareholders in the U.S. District Court for the District of Columbia for collection of legal fees, obtaining a default judgment on February 1, 1983. Sunland further submits that Andrew and

Rachel Kimm cross-claimed against United and the individual shareholders, alleging that the cross-defendants had fraudulently induced them into entering into the broadcast application venture upon the understanding that they would not be personally liable for the total indebtedness incurred, but that expenses would be shared *pro rata*. Sunland thus seeks against United and issue to explore the circumstances surrounding the fraud allegations and a reporting issue. (3) On March 6, 1984, KIST filed a petition to reopen the record questioning the continuing validity of the deferred equipment credit letter, which had expired by its terms in March 1983. KIST argues that it should not be presumed that the credit arrangement will be available should the application be granted in light of the serious financial difficulties currently being experienced by United and its principals. And (4) a series of petitions for leave to amend were filed by United on April 23, June 6, and August 15, 1984, respectively, informing the Board that the West Olympia Bank went out of existence (February 1984) and that its equipment credit letter expired (March 1983); that it has a new bank letter from the Los Angeles National Bank for a loan up to $2.5 million and a new equipment letter for equipment costing $1.8 million; and that its corporate charter is being amended to permit issuance of non-voting stock to various persons or companies, after which the equity in the company will be shared by the 50% voting stockholders and the 50% holders of preferred non-voting stock. The United petitions also included letters from correspondent banks indicating a willingness to participate in the syndicated loan and from the Los Angeles National Bank stating that its collateral requirements have been satisfied. Family, Sunland and KIST filed oppositions to the above petitions to amend contending that United has failed to demonstrate "good cause" for acceptance of the amendments. *See* 47 CFR §73.3522. Opponents assert that the amendments, if accepted, raise many new issues requiring further evidentiary hearing.

7. The proper starting point on this issue is the question of whether the ALJ was correct in concluding at hearing that United failed to demonstrate the requisite financial qualifications to be a Commission licensee. Although we are mindful that United's original proposal, *viz.*, the West Olympia Bank letter *et al.*, would be moot in any event in light of the bank's subsequent failure, it would be impossibly disruptive of our administrative processes (not to mention further delay of inauguration of a new broadcast service to the residents of Riverside) to afford United or any other comparative applicant, if correctly found financially unqualified after an extensive trial-type hearing, a post-hearing opportunity to establish its financial qualifications merely because of the fortuitous occurrence of the post-hearing failure of the bank relied upon by United. "Good cause" for accepting a late amendment must be shown. *See*

generally California Broadcasting Corp., 90 FCC 2d 800, 808 (1982) (fact that amendment was submitted to meet a disqualifying issue does not relieve the proponent of an amendment from meeting the Commission's "good cause" requirements).[3] A second and separate hearing under the instant circumstances would be enormously disruptive at this stage and would not be in the public interest. Obviously, if an applicant had established its financial qualifications at hearing and, subsequently, the bank upon which it relied for funds failed unexpectedly, the Commission would take into consideration the equities of the case in determining whether the applicant would be permitted to amend its application. *See, e.g., Valley Broadcasters, Inc.*, 95 FCC 2d 448 (Rev. Bd. 1983); *Anax Broadcasting, supra* note 3. In this proceeding, however, we need not speculate over what action would have been appropriate in the above situation since we find that United failed to establish its financial qualifications at hearing. *See* paras. 8, 10, *infra.*

8. Thus, the ALJ properly refused to credit the West Olympia Bank letter and correctly held it did not demonstrate United's financial qualifications to be a Commission licensee. As a general proposition, the Commission holds that a bank loan commitment letter provides reasonable assurance of the availability of a bank loan in the absence of a showing undermining the validity of the letter or the bank's ability to make the loan. *See Jay Sadow*, 39 FCC 2d 808 (Rev. Bd. 1973). But, where the proposed loan would *prima facie* violate statutory limitations governing the amount a particular bank may lend, the Commission may require a "further showing" of availability. *See CBS, Inc.*, 49 FCC 2d 1214, 1228-29 (Rev. Bd. 1974). United submits that the "further showing" requirement is satisfied simply by submitting evidence that the lead bank issuing the commitment letter is aware that the proposed loan will require the participation of other banks. *See* United Exceptions at 5. We disagree. Although the precedent relative to syndication loans may be written somewhat unevenly, *see Washington's Christian TV Outreach, Inc.*, 94

[3] The Commission has adopted a six-point "good cause" test under 47 CFR §73.3522(b).

> (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage.

Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970). While the Commission has relaxed its "good cause" test for amendments going to basic qualifications, *see Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981) (foreseeability not relevant and "due diligence" depends on the surrounding equities), it has not abandoned *all* prerequisites for the acceptance of such post-hearing amendments. *See Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *aff'd*, FCC 84-119, released April 2, 1984 (Comm'n).

FCC 2d 1360, 1362-1364 (Rev. Bd. 1983), we note that virtually all of the cases cited by United in support of its legal proposition contain significant elements which militate against the acceptance of the lax standard postulated by United.[4] More recent precedent holds that a "further showing" must be made that correspondent banks are willing to participate in the proposed loan. *See, e.g., CBS, Inc., supra,* 49 FCC 2d at 1229; *Advanced Mobile Phone Service, Inc. (Philadelphia),* 52 RR 2d 1593, 1597 (CC Bur. 1983).[5] In any event, where a specific issue *has* been designated by an ALJ and evidence from bank personnel *has* been taken, the question of whether there was, in fact, reasonable assurance of the availability of the applicant's funding must be evaluated on the basis of the evidence of record.

9. In that regard, United submits that the testimony presented by bank witnesses removed any doubt that it had reasonable assurance of the availability of the bank loan. United Exceptions at 7. It argues: (1) that Mr. Kim, a member of the Senior Loan Committee and signatory of the letter, testified that the (now-defunct) bank intended to syndicate the loan and did not then perceive any problem in arranging the syndication; (2) that Mrs. Woo-Chang Lee England, a loan officer, said she had known of three occasions where her bank had made participation loans, one of which was in the sum of $1,500,000; and (3) that Mr. Goon Suk Han, a director of the failed West Olympia Bank and a principal of United, noted that he was aware of at least one syndicated loan in which the bank had participated. *See id.*

10. Nonetheless, the ALJ was correct in finding that the general testimony of United's three witnesses provided no reasonable assurance of the availability of the total United loan. Initially, the failed bank's assets were relatively small, totalling a little over $22 million (Tr. 2314). Its unsecured loan limit was approximately $160,000 (Tr. 2315) and even

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[4] *See, e.g., TVue Associates Inc.,* 5 FCC 2d 419 (Rev. Bd. 1966) (applicant submitted letters from five other banks confirming that they would share in the loan to the applicant); *Adirondack Television Corp.,* 5 FCC 2d 623 (Rev. Bd. 1966) (failure to show that Commission had not fully considered matter prior to designation); *Lamar Life Broadcasting Co.,* 26 FCC 2d 112 (Rev. Bd. 1970) (applicant submitted a bank letter committing five banks and investment company to lend it the necessary funds); *Advanced Mobile Phone Service, Inc. (Phoenix),* 53 RR 2d 12 (CC Bur. 1983) (lead bank had capacity to provide entire credit package in the event other banks did not participate); *Cherokee Broadcasting Co.,* 88 FCC 2d 138 (Rev. Bd. 1967) (bank's board of directors approved handling the proposed loan applicant).

[5] *Contra Lamar Life Broadcasting Co.,* 26 FCC 2d 932, 938 (Rev. Bd. 1970), where the Board indicated that letters of commitment from participatory banks are not necessary. However, the language there did not relate to a financial issue, but was instead directed to a request for a reporting issue.

its secured loan limit was only $300,000 (Tr. 2315).[6] The proposed loan here in question was for $2 million, or approximately *12 1/2 times* the bank's unsecured credit limit and nearly *7 times* its secured credit limit. Second, it remains unclear to what extent the bank had previously participated in syndication loans. Mr. Han, who for two years had been a member of the bank's Senior Loan Committee (Tr. 2443), and is a United principal, testified vaguely that he was aware of one occasion in which his bank had participated in a syndicated loan (Tr. 2466). But, Mr. Kim, who had also been with the bank for two years and was also a member of the Senior Loan Committee (Tr. 3236-37), testified that he was unaware of the bank's involvement in any syndicated loans during his tenure (Tr. 3277). Mrs. England, a loan officer (but not a member of the Senior Loan Committee (Tr. 2313, 2322)), testified that she had no personal knowledge of the bank's approval of any loans in excess of its legal lending limit (Tr. 2319), though she said that she had been told by the Senior Loan Administrator that there were at least three occasions where the bank had made participation loans of unstated magnitude, perhaps for more than $1 million (Tr. 2325). However, the Senior Loan Administrator, who might have shed more light on this matter (*see* Tr. 2326), did not testify. Third, no arrangements whatever had been made with any other bank for participation in the proposed West Olympia loan (Tr. 3277), nor had that bank examined the financial statements of the principals or the applicant, save for an estimated income statement of the applicant (Tr. 3278). Fourth, the late West Olympia bank was completely unaware that United's proposed $1,800,000 in broadcast equipment would be subject to a prior security interest by the equipment manufacturer (Tr. 3295), and its Loan Committee had not even considered the proposed United loan (Tr. 3352). Finally, we differ with United's positive characterization of Mr. Kim's testimony; Kim merely indicated that he did not think the West Olympia Bank would "have a problem to syndicate the loans if we had a good product" (Tr. 3328). But, whether the "product" was "good" was apparently never discussed. In the face of the designated financial issue, the evidentiary burden or establishing reasonable assurance of the availability of the bank loan was on United, and, like the ALJ, we find that United failed this burden.[7] Rather, based on the record evidence, it would

[6] Secured loans were normally those guaranteed by a savings account (up to 85%), a savings secured loan, a first trust lien, or a guarantee by government agencies. Tr. 2316, 3323. In light of the financial problems experienced by this applicant and the secured interest on the equipment by the manufacturer, it is wholly open to question as to whether United would have been able to meet the bank's criteria for a secured loan.

[7] United implicitly argues that it should have a lesser standard of proof to meet, and concludes that the Commission has been moving steadily in the direction of removing financial impediments for minority persons to own and operate broadcast stations. *See* United Exceptions at 8. Although the Commission has, indeed, indicated its concern

seem that the West Olympia letter may have been more of an accommodation to Mr. Han, a director of the former bank, than a firm commitment that the Commission could credit as reasonable assurance of a $2 million loan. United's position here differs critically from the applicant who had relied on a similar bank letter in *Washington's Christian TV Outreach, Inc., supra* .There we felt that the applicant did not have sufficient opportunity at hearing to prove the availability of its financing, and we remanded the case for evidentiary hearing so that it might offer persuasive evidence. *See* 94 FCC 2d at 1364. In the instant case, United has had its full hearing opportunity, and it has not provided persuasive evidence in its favor. If anything, the evidence it did present casts serious doubt that the West Olympia Bank had the resources to make the loan or was reliably committed to that loan (on its own or with likely correspondent banks). In sum, we affirm the ALJ's conclusion that United is not financially qualified. In light of that disposition, we need not grant the petitions for enlargement of issues. Having failed once to demonstrate the financial qualifications, we will not reopen this hearing to decide whether United would be disqualified yet again, nor to make the rubble bounce. [8]

11. *Integration of Ownership and Management* .The *I.D.* concluded that the qualified applicants were entitled to quantitative integration credit as follows: KIST, 37.49% fulltime; Sunland, 35% fulltime and 55% parttime; Bethel, 33.3% fulltime; and Family 0%. The *I.D.* summarized that Sunland's integration proposal was superior to the other applicants because "only Sunland proposes to integrate a majority of its stock ownership (90%)." *I.D.*, at para. 165. We will review the exceptions to the underlying findings and conclusions.

12. *Integration Proposal of Family.* Family excepts to the ALJ's rejection of its ownership integration proposal, specifically his refusal to credit Ms. Cheryal Kearney as an 80% integrated owner of the applicant. His view is that the purported 5% principal, Jack Dalton, is the true party-in-interest and the *de facto* head of Family while the contrasting claim that Ms. Kearney is an 80% controlling owner is merely a "facade to maximize Family's chances of winning the comparative hearing." *I.D.*, at para. 159.[9] The ALJ's findings and conclusions on this matter are set

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relative to minority financing, *e.g., Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591 (1978), it has not as of this date adopted lower financial qualification standards for minority applicants. *See, e.g., Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n.5 (Rev. Bd. 1982).

[8] The recent bankruptcies and lawsuits involving United's principals would demand that a new hearing be held on United's financial qualifications, and we will not disrupt this proceeding to afford United yet another full hearing on its potential finances. It has already had its "day in court" and a fair hearing.

[9] Our inconsistency as to the respective ownership interests of Kearney and Dalton arises because of Family's post-"B" cutoff increase of Kearney's putative ownership interest

forth, respectively, at *id.*, paras. 101-112 and paras. 157-163. Summarizing the facts below, we analyze the exceptions under extant legal principals.

13. The ALJ found the sole progenitor and promoter of the Family application was Jack Dalton, a resident of Nashville, Tennessee, [10] who previously had a 33% interest in the assignee of a construction permit for a television station in Springfield, Missouri (KSPR-TV), an interest he sold during the course of this proceeding. *I.D.*, para. 99. After becoming aware of the instant Riverside opening, he singularly arranged for a $500,000 loan with his bank, Commerce Union Bank of Nashville, [11] personally guaranteed that loan, and even personally guaranteed that same amount to Family should the $500,000 bank loan prove inadequate.[12] Up to the close of hearing, Dalton "has provided all the funds for Family" in its quest for the station (*i.e.*, $65-70 thousand at that time).[13] Moreover, Dalton personally and unilaterally contracted with Sterling Communications, a consulting firm he had used in connection with his previous applications in Daytona Beach, Florida and Richardson, Texas, to "put the [Family] application together."[14]

14. Enter Ms. Kearney, a black resident of Los Angeles who, for the past 13 years, has been a "freelance set decorator," having earned her degree in interior design at Woodbury College and studied further in Paris where she met Mrs. Jack Dalton who was also studying there at that time.[15] Apart from one alleged social visit to the Dalton's Nashville home in 1980, she had never met Jack Dalton or discussed the broadcasting business with him until he telephoned her and sought her identity in the Riverside application.[16] Jack Dalton never met Kearney again until this hearing,[17] and Ms. Kearney has invested no money in the applicant. Dalton claims to have advanced the $1,000 for her purchase of her (95%)

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from 80% to 95% (and a corresponding reduction of Dalton's from 20% to 5%). *Compare I.D.*, para. 98, *with id.*, para. 157. The ALJ noted that even if Kearney was entitled to ownership integration credit, it could not exceed the 80% proposed before the legal deadline for comparative "upgrading." *Id.*, at n.42. While Family's exceptions skim over this matter and are occasionally inconsistent on the point, *compare* Family Exceptions at 27 ("Ms. Kearney has a 95% interest"), *with id.*, at 41 ("Family should have been awarded full 80% integration credit for Ms. Kearney"), we affirm the ALJ's ruling. Post-cutoff comparative "upgrading" will not be permitted. *Birmingham Family Television, Inc.*, 91 FCC 2d 348 (Rev. Bd. 1982).

[10] *I.D.*, n. 25.

[11] *Id.*, para. 110.

[12] *Id.*

[13] *Id.*, para. 109. Further, "Ms. Kearney had nothing to do with securing the Amvest equipment lease . . . ." *Id.*, at para. 108.

[14] *Id.*, at para. 107. For example, "the programming and EEO sections were prepared entirely by Sterling." KIST Reply at 9.

[15] *Id.*, paras. 102, 104.

[16] *Id.*, paras. 104, 107.

[17] *Id.*, para. 104.

stock share in Family, expects no repayment,[18] and "Ms. Kearney testified that they never discussed reimbursement of Mr. Dalton's advances." *I.D.*, at para. 109. In fact, "[t]here was an explicit agreement that Ms. Kearney would not be required to pay for her stock, make loans or make other advances to Family." *Id.* (transcript citation omitted). Moreover, while Dalton set up Family's corporate account in Nashville at Commerce Union Bank and was a signatory to the account,[19] Kearney (a purported 95% owner) was not even made a signatory until much later. And, while many checks have been written during the prosecution of the application, Kearney had never written a check on the Family account.[20] Dalton has written the checks for the applicant's bills and retains the checkbook in Nashville, far away from Kearney.[21] Finally, although seeking credit for fulltime (day-to-day) integration credit as the 95% owner of a new television station, Kearney would not, at hearing, commit herself to moving from Los Angeles or, indeed, moving closer to Riverside (a city some 65 miles east) *even if Family should here prevail.*[22] In light of the foregoing (as well as other revelatory indicia discussed in the *I.D.*), the ALJ invoked the principles reaffirmed in *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), looked beyond Family's paper corporate construct, and found—to no real surprise—that Dalton *de facto*controlled the corporation.[23] Using the language of *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 426 (Rev. Bd. 1977), he opined that recognizing Ms. Kearney as a *bona fide* 95% integrated owner of Family would "make a mockery of the underlying objective of the integration credit."[24]

15. Relying chiefly on the Commission's decision in *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981),[25] Family argues that "an applicant should receive integration credit for a principal who was given stock in the

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[18] *Id.*, para. 106.

[19] As was a Dalton associate in Nashville, Doctor Crants, who was involved in Dalton's Daytona Beach and Richardson applications (*I.D.*, para. 111), but who is not even a principal of Family.

[20] *Id.*, para. 111.

[21] *Id.* Doctor Crants (*supra* note 19) also signed Family's checks.

[22] *Id.*, para. 102. Notwithstanding Kearney's declination to indicate a move to Riverside or her complete lack of broadcast management experience, it is asserted that "she will supervise the construction and operation of the station" and "will be responsible for making decisions regarding employment, programming and the station's operating budget." *Id.*, at para. 101. Even had we not rejected Kearney's integration credit on the grounds set forth herein, her refusal to commit to a change of residence to (or close to) Riverside would probably deprive her of the right to be considered a local owner for integration purposes.

[23] *Id.*, para. 163.

[24] *Id.*

[25] Family also relies heavily on two subsequent Board decisions: *Las Misiones de Bejar Television Co.*, 53 RR 2d 119 (Rev. Bd. 1983); *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206 (Rev. Bd. 1983). *See* Family Exceptions at 13-14.

applicant precisely to enhance the applicant's integration showing by gaining a minority preference."[26] Thus, while unabashedly conceding at hearing that the "sole reason" Ms. Kearney was listed as a 95% owner of Family (and Dalton willing to retain a nominal 5%) was to dispositively outdistance his competitors on ownership integration credit[27] Family submits that "there are strong policy reasons for allowing applicants to achieve integration credit by giving equity to minorities interested in entering broadcasting."[28] Additionally, Family protests the ALJ's rejection of the ownership integration credit sought for Ms. Kearney while accepting the integration proposals of two of its competitors, Sunland and United; it asserts[29]:

> Finally, the ALJ's disparagement of the relationship between Ms. Kearney and Mr. Dalton is in remarkable contrast to his failure even to note that the financing principals of Sunland and United had never met proposed integrated principals in their application, Messrs. Soto and Digati, until their respective applications were filed or even later. Messrs. Soto and Digati also had not contributed to the finances of their respective applicants ... , and were expressly recruited to enhance the comparative position of their respective applicants.

16. Family's vital reliance on *Alexander S. Klein, Jr., supra,* as a basis for crediting Ms. Kearney as a 95% integrated owner is rejected. As the ALJ reasoned, while the *Klein* Commission credited the integration pledge of a principal whose minor 5% stock interest in the applicant was a gift from her long-time employer[30], "[a] gift of a 95% controlling interest

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[26] *Id.*, at 13. Preferential comparative treatment is given to broadcast applicants who propose to integrate (racial) minority (and/or female) principals into the management of a station. *See, e.g., West Michigan Broadcasting Co.* v. *FCC*, No. 82-2513 (D.C. Cir. May 25, 1984).

[27] *I.D.*, para. 105 (and supporting transcript citations). Integration of ownership with management yields a substantial preference under the seminal *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *Cf. West Michigan Broadcasting*, note 26 above.

[28] Family Exceptions at 13.

[29] *Id.*, at 15-16 (citations omitted). *See also id.*, at 30-41. Family is not alone in questioning the ALJ's acceptance of Sunland's integration, for:

> In their proposed findings, all parties except Ettlinger and Sunland analyzed the Sunland partnership structure, concluding that it should be treated as a sham, thus entitling Sunland to 0% full-time integration credit under the doctrines of *Berryville Broadcasting Co.*, ... However, the ALJ refused to engage in an extensive analysis and concluded that Sunland was entitled to the integration credit which it claimed.

KIST Exceptions at 3 (citations and footnotes omitted). Sunland's integration proposal and the alleged disparate treatment are discussed *infra*, paras. 22-26.

[30] *See* 86 FCC 2d at 432. All the Commission there held was: "Giving media entrepreneurship to a trusted former employee is a logical means of promoting minority involvement in broadcasting." *But see* Dissenting Statement of Comm'r Anne P. Jones, FCC 81-560, released December 2, 1981 (reconsideration of *Klein*).

is a totally different matter." *I.D.*, at para 159.[31] First, there is no former employment relationship between Kearney and Dalton which, in any atmospheric sense as in *Klein*, could be equated with "consideration" for the stock; there was no relationship between Jack Dalton and Ms. Kearney before the filing of the application, and precious little thereafter. *See I.D.*, paras. 104-112. Nonetheless, Family buttresses its theory that the gift of 95% of its stock to Kearney is creditable for ownership integration purposes by citing two recent Board decisions, *Las Misiones de Bejar Television Co.* and *San Joaquin Television Improvement Corp.*, *supra* note 25. However, both of those cases are sharply different. In *Las Misiones*, the Board was faced with an integration proposal involving 11% minority owners who had taken bank loans to purchase their stock, but whose non-minority principal had guaranteed those loans. 53 RR 2d at 123. Quoting the ALJ, we there reflected that "[t]hose minorities recognized their limited stock interest," *id.*, and that all of the minority stockholders were *personally* liable for their stock. *Id.*[32] *San Joaquin* is completely inapposite. There the question was whether a "limited" partnership agreement allocating 45% of the equity of the applicant to the "limited" partners (who provided capital but no other future services and who sought no integration credit) and 55% to the "general" partners (who provided no capital but would fully manage the station) was cognizable for ownership integration purposes. The Board there found that the "limited" partnership agreement conformed in all respects to the Uniform Limited Partnership Act and represented a *bona fide* business arrangement. *See* 54 RR 2d at 1210-1211. Under the holding of *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 487-488 (1981), the integra-

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[31] It may be perceived by some (as was jibed at oral argument) that the difference between *Klein* and Family is analogous to the difference between petty larceny and grand larceny, but the difference in a comparative sense is truly substantive. *Compare West Michigan Broadcasting*, *supra* note 26 (100% minority-female integrated ownership entitled to significant enhancing weight), *with Horne Industries*, *infra* note 32 (15% minority ownership "comparatively insignificant").

[32] There were other telling differences in *Las Misiones* as well: for example, minority stockholders there were involved in the negotiations for the applicant's loans and certain ones either sought their *own* financing for the loans or were prepared to pledge their personal net worth for the applicant's loans. *See* 53 RR 2d at 123. Family points to dictum in *Las Misiones* which may have suggested that even if the stock to the 11% minority principals had been a gift, "[o]ur action on this matter is squarely controlled by ... *Klein.*" *See, e.g.*, Family Exceptions at 13 (*citing* 53 RR 2d at 124). While the *Las Misiones* Board might, under similar factual circumstances, have extended *Klein's* beneficence from 5% to 11%, that is a far cry from Family's situation. For while we generally consider 11% minority ownership to be "comparatively insignificant," *Horne Industries, Inc.*, 94 FCC 2d 815, 828 (Rev. Bd. 1983) (15% minority interest deemed "comparatively insignificant"), *modified*, FCC 84-286, released July 20, 1984 (Comm'n), a 95% ownership credit for an integrated minority female would be dispositive in most cases. *See West Michigan Broadcasting Co.* v. *FCC*, *supra* note 26.

tion of the "general" partners was credited.[33] But, in *San Joaquin*, there was no strained attempt by the "limited" partnership principals to structure the ownership so as to garner enhanced integration credit for minority and/or female ownership.[34] Indeed, the only female principal of the winning applicant (Darlene Spano) was a joint owner of the 45% "limited" partner; she neither asked for nor received integration credit or "female enhancement." *See* 54 RR 2d at 1210.

17. Importantly, though, neither *Klein* nor any subsequent case has overturned *Henderson* and *Berryville*, *supra*, or the critical precepts set forth therein to ensure that a purported principal is a true party-in-interest or, *de facto*, has that quantum of controlling leverage depicted in the paper organizational structure. These matters are important not only from a comparative licensing standpoint, but unless proposed applicant principals have a palpable stake in ultimate license, there is considerably less assurance that an alleged "integrated owner" will be scrupulously faithful to the public trust embodied in a license. Or, to put it aphoristically, "ease come-easy go." Thus, in *Henderson*, the Board rejected the ambitious scheme of a designing entrepreneur to secure 100% ownership integration credit by purporting to donate all of the corporate "voting stock" and "all but one share of its non-voting stock" to the applicant's "vice-president, director, and general manager," a man whose tangible contribution to the corporation had been about $300. 63 FCC 2d at 421. Ignoring the paper veil, the Board found that the applicant's entrepreneur who held "control of its 'purse strings' " (*id.*, at 425), who had dominated the applicant by being virtually its "sole financier," and who would "contribute all of the monies required for the cost of construction and operation of the station" (*id.*, at 421) was "the real owner and sole proprietor" (*id.*, at 425) despite the *de jure* emblements. Similarly, the *Berryville* Board refused to credit the integration proposals of two "nominal partners" claiming ownership interests of 20% each and found that the (legal) 60% owner, who had advanced all the funds for the partnership, was the true and actual owner. Like Ms. Kearney of Family, the "nominal" *Berryville* "partners" had contributed no capital to the venture, whereas - by contrast and like Family's Dalton - the 60% *Berryville* principal had not only contributed all the advance funds, he had singularly arranged the bank loan (70 FCC 2d at 10), controlled the company checkbook (*id.*, at 9), and had prior involvement in broadcast

[33] *See also Minority Ownership in Broadcasting*, 92 FCC 2d 849, 853-855 (1982).

[34] In fact, neither "general" partner (hence 100% of that applicant's integration base) received minority or female enhancement. *See* FCC 83D-35, released June 27, 1983 (ALJ), (*I.D.*, para. 53).

stations (*id.*).[35]

18. From the foregoing paragraph, it might be inferred that the Commission's inevitable route to a determination as to *de facto* ownership was cartographed by "Watergate's" celebrated "Deep Throat," who persistently enjoined: "Follow the money." While an immediate financial investment is not the exclusive watermark of actual applicant ownership, *see, e.g., San Joaquin, supra,* it has long been recognized that financial dominance is a strong determinant of *de facto* control. Thus, the court has long appreciated that even a mere creditor whose position enables him to control aspects of an applicant's financial affairs must be recognized as negatively affecting an applicant's integration proposal. *WLOX Broadcasting Co.* v. *FCC,* 260 F.2d 712 (D.C. Cir. 1958). And, financial leverage remains a trustworthy clue in the Commission's search for *de facto* control, irrespective of legal title. *See, e.g., Stereo Broadcasters, Inc.,* 55 FCC 2d 819, (1975) ("the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides"). *See also George E. Cameron, Jr. Communications,* 91 FCC 2d 870, 887-893 (Rev. Bd. 1982), *recon. denied,* 93 FCC 2d 789 (1983).[36]

19. In the instant record, there can be no serious question that Jack Dalton has solely controlled, and will for the foreseeable future control, the actual destiny of Family, regardless of the names on the company stock shares.[37] While Family continues to pound away on Ms. Kearney's 95% "voting" control, it is clear here — as it was in *George E. Cameron,*

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[35] To be sure there were other indications in *Berryville* that the 20% minority principals were not *bona fide* partners. And, while the Board — citing *Klein* (*see* 70 FCC 2d at 8 n.13) — there recognized that individuals from minority groups could, under appropriate circumstances, be considered the beneficiaries of an outright gift of a portion of equity, it found no gift in that case. Similarly, while Family's exceptions and brief casually invoke *Klein* and covet its "gift" precedent, Dalton testified that he merely "lent" the money so far spent to Kearney. *I.D.,* para. 109. He said that the "loan" would accrue interest at 1% above prime after station operations begin. *Id.* Moreover, Family's brief is at pains to argue that Kearney *is* financially committed. Family Exceptions at 21-24. It states, for example, that her out-of-pocket expenses during the prosecution of the application (including "loss of other salary") "are well in excess of the $950.00 that Mr. Dalton paid Family for her stock." *Id.,* at 22. To the extent that Family asserts that Kearney has furnished reasonable consideration for the ($1,000) price of her stock, the "gift" precedent appears inapplicable.

[36] *Cf. Metromedia, Inc.,* 55 RR 2d 1278 (1984), *recon. denied,* FCC 84-364, released August 10, 1984, where the Commission, citing *Stereo Broadcasters, supra,* found that an individual with far less than voting control of a public corporation had long had *de facto* control.

[37] Dalton has openly confessed that he has not paid too much attention to "corporate formalities." *I.D.,* at para. 112. Family "directors," Dalton and Kearney, have never had a corporate meeting, and Dalton continuously ignored corporate bylaws by taking unilateral action *legally* delegated to the Family board of directors. *See id.*.

Jr. Communications, supra — that Dalton, the *de jure* minority principal, totally controls the flow of the Family vessel, can shift course at will, or can stop it dead in the water at any time. No further prosecution of the application could take place without his impetus; not a spade of earth could be turned nor a tower girder riveted without Dalton's pure acquiescence. And even were Family to be licensed, not a studio bulb could light, a program be purchased, or a signal be emitted without Dalton's complete cooperation, irrespective of how Ms. Kearney "voted" her stock; many TV seasons would pass before her empty "vote" could (but not necessarily *would*) translate into anything approaching practical control.

20. We are not insensitive to the movement to assist minorities who wish to enter broadcasting, and we have granted many, many licenses to qualified minority (or part-minority) applicants. We have, from time-to-time, even bent the precedent backwards to assist. *See, e.g., Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360 (Rev. Bd. 1983). But, even as the Commission has altered its views on ownership structures and organizational control mechanisms to aid minority entry into broadcasting, *see Minority Ownership In Broadcasting*, 92 FCC 2d 849 (1982) (recognizing, *e.g.*, "limited" partnership device for promoting venture capital), the Commission, recognizing the serious potential for abuse, pointedly warned "that in order to avoid 'sham' arrangements," it would monitor such arrangements on a case-by-case basis to ensure that *actual* control reposes in minority principals. *Id.*, at 855. While Family likens Dalton to a "limited" partner who provides only the capital financing (and, presumably, likens Kearney to a "general" partner),[38] there are critical factual and legal differences: "general partners are personally liable for the partnership debts," *Minority Ownership, supra*, 92 FCC 2d at 854; Family's Kearney is liable for none. *I.D.*, paras. 109-110. "Limited" partners "do not exercise any managerial control and do not incur any personal debts beyond their limited capital contribution." 92 FCC 2d at 854. Family's Dalton controls, and will control, Family absolutely for the foreseeable future; and he (a nominal 5% owner) has personally guaranteed the corporations's entire $500,000 bank loan (and personally promised an equal amount if necessary). *I.D.*, para. 110.[39]

21. In sum, Sunland states the matter at issue most succintly[40]:

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[38] *See, e.g.*, Family Exceptions at 14-15. Family insists that it should not be penalized for choosing corporate rather than partnership form. But it is not a matter of "form"; under law, partners (particularly "general" partners) have obligations and liabilities that corporate stockholders do not. *See Minority Ownership, supra*, 92 FCC 2d at 854.

[39] While Ms. Kearney's personal guarantee and financial statement was also offered to Dalton's Nashville bank, the bank was uninterested, *I.D.*, para. 110, and Dalton did not even submit her material to the bank. KIST Reply at 8.

[40] Sunland Reply at 16.

> Family presents a classic case for the application of *Henderson* and *Berryville*. Dalton utilized Family's ostensible stock structure as a contrivance to further his own ambitions to acquire a television station at Riverside by gaining credit under the integration criterion. He then exercised control over the application in a manner wholly inconsistent with the structure. It is hardly possible to imagine a more transparent artifice. Failing to apply *Henderson* and *Berryville* here means the end of their vitality in policing the *bona fides* of proposals to the Commission.

We concur, and the ALJ's well-documented and well-considered rejection of Family's claim for 95% (or 80%) ownership integration credit is affirmed.

22. *Integration Proposal of Sunland.* As noted above, Sunland forcefully pleads against a concession of the ALJ's rejection of Family's ownership integration scheme[41]; but other parties hereto demand with equal vigor that Sunland's own integration proposal is, *ad eundem*, flawed.[42] Armored in the spiney carapace of righteous indignation over alleged discriminatory treatment by the ALJ, Family leads the pack of Sunland's predators and charges that "special provisions" in the Sunland partnership agreement wholly undercut the putative ownership interest of one of Sunland's two purported partners, Andres Luis Soto, a local (Riverside) hispanic citizen with a reported 35% partnership interest in Sunland.[43] The other applicants opposing Sunland's integration credit for Soto, citing *Henderson* and *Berryville*, contend that Soto's commitment to, and responsibility for, Sunland's application and its potential future operations are nonexistent, thus depriving Sunland of Soto's credit for ownership integration. They claim that the real party-in-interest is Jack M. Hodin, a 55% Sunland principal and a present (long-time) resident of Scranton, Pennsylvania, who also holds a 30% interest in a Scranton supermarket chain as well as having other substantial investments in that region.

23. In crediting Sunland with Soto's integration proposal, the ALJ considered the objections of the parties, but found[44]:

> ... Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership.

However, it is stipulated by Sunland that (1) "prior to the grant of Sunland's application Hodin would contribute Soto's share of capital on a loan basis" and (2) "if Sunland's application, was not granted, Soto would

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[41] Sunland Reply at 13-16.

[42] *See, e.g.*, KIST Exceptions at 8-19; Bethel Exceptions at 7-16; United Exceptions at 22-26; Family Exceptions at 15-16, 30 *et seq.*

[43] Family Exceptions at 16, 36-37. It also asserts infirmities in the integration proposals of "EBC, United, Bethel, and Channel 62." *See id.*, at 31 (*et seq.*)

[44] *I.D.*, at para. 154. Soto is the proposed fulltime general manager of the potential Sunland broadcasting facility. *I.D.*, para. 80.

have no obligation for these contributions."[45]

24. We have observed (*supra* para. 18) that an immediate financial investment, though generally signalling a positive ownership commitment, is not necessarily the *sine qua non* of an ownership interest creditable for integration purposes. *See, e.g., San Joaquin Television Improvement Corp., supra.* It is merely one indicator, and had the parties here alleged nothing more than lack of "front money" from Soto, Sunland might well deserve creditation of Soto's purported 35% partnership interest. However, not only need Soto contribute no initial capital for prosecuting the application or constructing or operating any new station, and not only is he indemnified from all past and present Sunland expenses should it not receive this permit, the Sunland partnership agreement was specifically modified to provide[46]:

> Net losses shall be borne in proportion to contributions actually made by the partners in the partnership. Until Hodin is reimbursed for the contributions advanced by him on behalf of Strimel and Soto, all contributions shall be deemed to have been made by Hodin.

Thus, even if Sunland received the instant construction permit and commenced operations, Soto would still not have incurred one dime's worth of legal obligation or responsibility for the entity. Or, as one of the other parties framed it, having incurred no risk up to now, nor incurring any liability for future expenses or losses, Soto could simply "walk away from the partnership" with no less than he entered it. This is no genuine "partnership" - in the legal or any other sense.[47] *See Berryville, supra.* We might, hypothetically, view Hodin's munificence as a "gift," except that — while arguing that *Alexander S. Klein, Jr., supra,* controls its integration credit — Sunland inconstantly argues just as strenuously that[48]:

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[45] Sunland Reply at. 5. And, like Family's Cheryal Kearney, Soto has contributed no "financial resources to Sunland to aid in the application and hearing process." *I.D.*, at para. 154. Soto, who was not Hodin's first choice as a hispanic partner because he could not contribute anything to the venture, testified:

> I indicated to him [Hodin], well I'm not a rich man and so I can't really contribute financially.

KIST Exceptions at 11 (*quoting* Tr. 1261.)

[46] Bethel Exceptions at 11 (*quoting* Family Exhibit 9 at p. 4). Soto's testimony affirmed his understanding that he is not legally obligated to pay his proportionate share of any partnership losses. KIST Exceptions at 16 (*citing* Tr. 1271).

[47] As observed in the Commission's most recent *Minority Ownership* policy statement, *supra*, one of the primary characteristics of a true general partnership is that each such partner is "personally liable for the partnership debts." 92 FCC 2d at 854. Here, Hodin has absolutely relieved Soto of liability for Sunland's losses.

[48] Sunland Reply at 5 (*quoting I.D.*, at paras. 51-52) (footnote omitted). Sunland further submits (*id.*):

> . . . it must be remembered that Mr. Soto is required to pay back any advances to him from future station profits. Further, Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership . . . .

But future "profits" are subject to many vicissitudes: *viz.*, payments to principals; withdrawal of partnership equity; leveraged business expansion. Or, mercy, *real* operating losses, and profits from this Riverside UHF facility are far from a sure thing. More to the point regarding the applicability, *vel non* of *Klein*, if Hodin considers Soto to be contractually obligated to reimburse for all prior and future Sunland expenses (out of hypothetical "profits"), then there is no "gift" as in *Klein*. Sunland cannot, as they say, have it both ways.

25. Further, as with Family's misreliance on *Klein*, Sunland's must fail for similar reasons. For apart from the fact that *Klein* uniquely involved a mere 5% gift of stock to a trustworthy former employee (*see supra* note 30), the sequence of events precipitating Soto's 35% "partnership" interest confirms the underlying differences. As related by the excepting parties, Hodin's original application listed one George B. Strimel as a 10% partner.[49] Advised of the Riverside opening by Washington counsel, Hodin went to Riverside to conduct the "ascertainment" study of community leaders. He met Soto and told him that he would like to add a hispanic investor who could contribute financially to the venture. Soto introduced Hodin to a friend in the banking business, but the friend had no interest in contributing (nor could Soto find another hispanic investor interested in contributing). Unable to so augment his application, Hodin — just *four days* before the "B" cutoff deadline — listed Soto himself as a 35% partner.[50] This bears no relationship to the facts in *Klein* and is little different than the exploits of Family's Jack Dalton explained *supra*.

26. We are constrained to find Soto to be a Sunland "partner" in name only, *Berryville!*, *supra*, and reverse the *I.D.*, in its grant of ownership integration credit for Soto's putative interest. Whereas the ALJ was

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> If a gift of a critical ownership interest could qualify for integration credit under *Klein*, certainly a nonrecourse advance of funds, to be repaid if the applicant prevails, would pass muster.
>
> Unfortunately for Sunland, its partnership agreement does *not* call for repayment "if the applicant prevails."

[49] *See I.D.* at para. 77 & n.17. Strimel dropped out after the "B" cutoff date, raising Hodin's current share to a 65% partnership interest. Because we do not allow comparative "upgrading" after the deadline (*see supra* note 9), Hodin is legally regarded here as a 55% owner. He was credited with only parttime integration (20 hrs. per week or less), since he has substantial investments he must attend to in Scranton. *See* KIST Exceptions at 10.

[50] For a more complete chronology, *See* KIST Exceptions at 10-11.

certainly correct in denying such ownership integration credit for Ms. Kearney of Family, Family is also quite correct in asserting that, *pari passu*, Soto has no greater legal or practical obligation to Sunland than Kearney does to Family. Nor any greater entitlement to the unique "gift" precedent of *Klein*. Like Family's Cheryal Kearney, Andres Soto — an otherwise highly impressive individual[51] — has no present tangible interest in, or true (proportionate) partnership position with respect to the Sunland applicant.[52] That he "might" in the future (profits and many other matters being congenial) does not make him a true Sunland partner at present. Uniformly applying the precedents, particularly *Berryville*, no fulltime credit will be given based on Soto's nominal partnership interest in Sunland.

27. *Other Integration Proposals.* The ALJ awarded KIST 37.49% fulltime integration credit,[53] but denied credit for their proposed parttime principals, holding that the ordinary sales positions the latter would occupy were nonmanagerial.[54] The only real challenge to KIST's fulltime credit comes from Family, which asserts that KIST's "non-integrated Chairman of the Board and largest single stockholder who is also Chairman of the Board of the bank upon which KIST is relying for a loan testified that he had 'the ultimate decision on the conduct of the Station Manager and all personnel.' "[55] Well, we should hope so, but we rather miss Family's point. KIST has not claimed fulltime integration credit for

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[51] *See I.D.*, paras. 80-82. But, while Soto is slated to be the Sunland station's general manager, *see id.*, at para. 80, he is said to have virtually no business or managerial background. KIST Exceptions at 16.

[52] Bethel (and others) further argue, in essence, that Soto will have no control over the affairs of Sunland, *e.g.*:

> Nothing in the Sunland partnership agreement prohibits Mr. Hodin, as majority partner, from exercising total, unfettered control over such critical items as the proposed station's programming and personnel policies.

Bethel Exceptions at 13. But — unlike the situation with the hyperambitious Family applicant where Ms. Kearney was depicted as the 95% principal (with all of the influence and control that "lion's share" ordinarily implies) — Soto was always portrayed as a minority partner. Sunland has never claimed that Soto would control the entity or that Hodin did not have both *de jure* and *de facto* control.

[53] *I.D.*, para. 152.

[54] *Id.*

[55] Family Exceptions at 32 (*quoting* Tr. 908). It later submits:

> Finally, KIST's non-integrated Chairman of the Board's similar position with the bank upon which KIST is relying for its loan should raise far more serious questions than Family's reliance upon a bank in which one of its principals has deposits.

Id., at 35.

its Chairman (and 12.5% principal),[56] and we would assume that his position — with the support of the majority stockholders — would generally prevail.[57] And KIST's 37.49% credit inherently reflects the owners who are to be integrated do not control the entity. For its part, KIST excepts to the ALJ's rejection of its parttime proposal and an hispanic "enhancement" for another principal (Carlos Fox) on the claim that Fox's grandfather was born in Cuba.[58] We have reviewed the record, and will afford KIST a very slight enhancement for Fox's (8.33%) interest; the ALJ reasons for denying Fox's claimed hispanic status are not necessarily determinative.[59] We will deny KIST's exceptions to the ALJ's denial of parttime credit, for his analysis in the *I.D.* is clearly correct that KIST's request for "residual credit" for the two salesmen (including banker MacCauley who said he would help in sales) is not supported by precedent.[60]

28. Bethel, a nonstock corporation, was awarded 33.33% fulltime integration credit for the proposed participation of one of its three directors, Carl E. Vaughn, who would serve as the station's general manager.[61] KIST contends that although a director of a nonstock corporation is usually ceded integration credit in proportion to the number of directors (such directors being likened to principals or shareholders[62]), Vaughn should receive none here because the applicant "is completely controlled and dominated by Bethel Christian Center." Imposing an analysis similar to that used with Family and Sunland's integration proposals, KIST asserts that the "Center has provided all Bethel funding,"[63] "Bethel has no bank account," and its "funds remain in the account of the Center."[64] It also observes that the Chairman of the Center

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[56] *I.D.*, para. 65

[57] KIST's largest stockholder and Chairman is Hugh B. MacCauley, *I.D.*, para. 50; as noted, his request for integration credit as a would-be part-time salesman has been denied and no "residual credit" as mentioned in the *I.D.* (para. 165) is due to KIST.

[58] KIST Exceptions at 23. The question of who qualifies for preferential treatment as a hispanic is apparently unsettled. In incorporating a minority preference in the FCC's lottery authority (*see* 47 U.S.C. §309(i)(3)(A)(1982)), Congress stated that "Office of Management and Budget Statistical Policy Directive No. 15 'Race and Ethnic Standards for Federal Statistics and Administrative Reporting' be utilized with regard to any dispute as to an individual's membership in a named group." H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 45 (1982) (Conference Report). In pertinent part, Directive No. 15 considers hispanic a "person of ... Cuban ... or other Spanish culture or origin ...." *Id.* (at p. 37).

[59] *See I.D.*, para. 152 (no hispanic surname, little Spanish spoken, not a member of hispanic organizations, mother not hispanic).

[60] *See* KIST Exceptions at 23-27.

[61] *I.D.*, para. 155.

[62] *See, e.g., Farragut Television Corporation*, 8 FCC 2d 279 (1967).

[63] KIST Exceptions at 28.

[64] *Id.*

(by Bethel's by-laws) will always be a Bethel board member.[65] Family's exceptions make the same point.[66] Bethel does not deny the substance of the foregoing; instead it labels such "a patent attempt to interject a real party-in-interest issue" at a belated procedural point.[67]

29. We will affirm the ALJ. In so doing, we must note at the outset that the *Henderson* and *Berryville* mode of analysis for filtering integration credit is not a particularly good fit in the case of nonstock entities. Most cases dealing with this issue involve either religious or educational applicants where a parent institution specially creates a new corporation, the sole purpose of which is to apply for and operate a broadcast station. *See, e.g., Roanoke Christian Broadcasting, Inc.*, 92 FCC 2d 1477, 1478-1479 (Rev. Bd. 1983) (fulltime participation by all four directors of nonstock corporation yields 100% integration credit); *see also Las Misiones, supra* (withdrawal of 1 of 3 directors reduces integration credit to 66%). When dealing with such entities, it is silently assumed that the directors of the applicant organization are not necessarily the financiers. Yet — for integration purposes — we have regarded those directors as tantamount to "principals." To do otherwise would, most likely, deprive such institutions of any opportunity for integration credit and, therefore, usually the license. Furthermore, in an early comparative case the Commission reversed the Board's denial of integration credit for directors of a nonstock corporation, which entity was controlled by a parent corporation (having common directors with the applicant corporation). *Farragut Television Corp., supra* note 62 8 FCC 2d at 282-283. Nothing here distinguishes Bethel from this line of cases, nor do the exceptors prove so. The management integration of one of Bethel's (three) corporate directors will be credited and the ALJ affirmed.

30. United has been disqualified on finances (*supra*, paras. 3-10), and we need not resolve the questions posed by the exceptions to its integration proposal.

31. *Comparison of Ownership Integration.* Having rejected the integration proposals of Family and Sunland (and finding it unnecessary to ruminate on the integration proposal of the disqualified United), the two leading applicants under this particular comparative criterion are KIST, which is afforded a 37.49% fulltime factor, and Bethel, with a corresponding 33.3% factor.[68] There being no clear quantitative difference between the two, *see, e.g., North Carolina Radio Service, Inc.*, 92 FCC 2d 621 (Rev. Bd. 1982), *review denied.* FCC 83-211 (mem.), released May 3, 1983 (Comm'n), any preference under this criterion depends upon the

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[65] *Id.*

[66] Family Exceptions at 34.

[67] Bethel Reply at 6-7.

[68] As indicated *supra*, neither KIST nor Bethel receives parttime credit.

qualitative difference between the integration proposals. *See id.* In that regard, Bethel urges that it be preferred because of its integrated (33.3%) principal's "local residence and local civic involvement."[69] It relies, in part, on the fact that KIST's 29.16% local residence level is below its 33%. But, KIST is entitled to a very slight enhancement of its integration credit for its 4.17% female[70] and its 8.33% hispanic[71] principals. In light of the Commission's racial and sexual preference policies, KIST wins under the integration criterion, although we must say that its leading edge is relatively razor thin.

32. *Diversification of Control of the Media of Mass Communications.* The ALJ concluded that all of the remaining applicants were even under the diversification criterion. Except for Family, none of the other applicants nor their principals hold other media interests. *I.D.*, para. 148. With respect to Family, its *de facto* sole stockholder (*see supra*, paras. 12-21), Jack Dalton, became a "limited" partner subsequent to the B cut-off date in the proposed assignee of a construction permit in Springfield, Missouri for KSPR(TV), an assignment subsequently approved by the Commission. The interest was not attributed to Family, however, because — prior to the consummation of the sale — Mr. Dalton expressly agreed to sell his interest and, in fact, did divest the Springfield interest shortly after the Commission approved the assignment. *See id.*, para. 150. Moreover, Ms. Erma L. Freeman, Family's secretary was a 2% stockholder of a construction permittee for a new television station at Reno, Nevada at the time Family filed its application. She has since sold her interest. The ALJ discounted the Reno interest because she has no ownership interest in Family nor, in his view, a position of managerial significance. *See id.* Sunland excepted, claiming that Family should have received some media diversification demerit for Dalton's and Ms. Freeman's interests.

33. We agree with Sunland to the extent that the remaining applicants are entitled to a very slight diversification preference over Riverside Family because of Dalton's "limited" partnership interest in the Springfield, Missouri construction permit. *See Greater Wichita Telecasting, Inc.*, 52 RR 2d 926, 928 (1984); *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1049 (Rev. Bd. 1982). As a general matter, in order to prevent

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[69] Bethel Exceptions at 17.

[70] *I.D.*, para. 152.

[71] *See supra* para. 27 according consideration of Carlos Fox's grandpaternal genotype. Even so, KIST's enhancement for these levels of FCC-favored racial and sexual characteristics is relatively slight, *see Alexander S. Klein, Jr., supra*, 86 FCC 2d at 428-429. As the Commission clarified recently, it "will continue to consider participating minority [and female] ownership which is less than controlling to the degree of minority [and female] ownership and participation represented." *Horne Industries, Inc.*, FCC 84-286, released July 20, 1984, at para. 6.

comparative "upgrading" after the legal deadline, we do attribute media interests to an applicant if its principals hold such interests on the "B" cutoff date unless the applicant submits an unequivocal commitment on or before that date to divest the interest upon grant of its application. *See, e.g., High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 635 (Rev. Bd. 1983). Here, Dalton was a principal of the Springfield applicant on April 14, 1982 (*see* United's amendment filed on April 23, 1982 reporting the Springfield interest), but the application was not granted until August 4, 1982, and that interest not sold until August 17, 1982. The Springfield interest must therefore be attributed to Family for diversification purposes. The ALJ acted correctly, however, in discounting Ms. Freeman's interest since, indeed, she is neither an owner of Family nor occupies any significant managerial interest. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 n.5 (1965).

34. *Auxiliary Power.* Sunland urges that the ALJ erred in rejecting its auxiliary power exhibit and in failing to accord it a comparative preference for its auxiliary power proposal. The ALJ rejected the exhibit on two grounds: (1) credit was not sought prior to the B cut-off date; and (2) auxiliary power credit is given only for AM and FM stations, not television proposals. *See* Tr. 408, 410, 438. Subsequent to that ruling, however, the Review Board accorded a television applicant a preference for its auxiliary power proposal. *See San Joaquin Television Improvement Corp.*, 54 RR 2d 1206, 1214 (Rev. Bd. 1983). KIST observes in its reply that it too tendered a similar exhibit, which was likewise rejected, and that if one applicant is awarded a minor enhancement for auxiliary power, then each of the applicants who proposed auxiliary power should be awarded the same credit. *See* KIST Reply 3-4. We will deny the exception. Although one ground supporting the ALJ's ruling has been vitiated by *San Joaquin Television Improvement Corp.*, the remaining basis warrants affirmance of the ALJ's ruling. That is, an applicant cannot "upgrade" its comparative position after the deadline for filing amendments as of right (the B cut-off date) has elapsed. *Birmingham Family, supra* note 9. None of the parties will receive a comparative preference for belated proposals of auxiliary power.

35. *Public File Issue.* By *Order*, FCC 82M-1645, released May 24, 1982, the ALJ added an issue against Family to determine whether it has violated Section 73.3526 of the Commission's Rules and, if so, the effect on its comparative qualifications to be a Commission licensee. That rule requires broadcast applicants to maintain a public inspection file containing the material specifically prescribed therein. The *I.D.* found that two application amendments were not placed into Family's inspection file in a timely manner. *I.D.*, paras. 47-49. He did not assess the applicant a comparative demerit, however, because there was no evidence of either an

intent to conceal information or any harm to a member of the public, and also because the violation appeared to be *de minimis.* Sunland argues that a slight demerit is appropriate, *citing HLD&M Communications*, FCC 82D-64, released September 13, 1982 (ALJ). We disagree. In *HLD&M Communications*, several individuals, including a news reporter, requested to inspect the file over a multi-month interval and were unable to see the file because it was missing. A slight demerit was there assessed. Here, the violation was less serious, and was quickly remedied when the applicant was apprised that its public file was incomplete. *I.D.*, para. 146. Under the circumstances, we conclude that the ALJ properly declined to assess Family any comparative demerit. *See Gilbert Broadcasting Corp.*, 55 FCC 2d 579, 582 (Rev. Bd. 1975), where the Board refused to specify a public file issue on allegations that a single amendment was absent from the applicant's public file.

36. *Request for ex parte issue.* By petition of August 23, 1984, Family requested the addition of an issue to determine whether KIST has violated either Section 1.1225 or Section 1.1227(e) of the Commission's Rules barring the solicitation of *ex parte* contacts in an ongoing adjudicatory proceeding.[72] Family's petition was inspired by service on the parties of a copy of a letter from the Commission's Office of Managing Director to Congressman Alfred A. McCandless advising the Congressman of the status of this case and refusing to address the merits of the case by citing our *ex parte* rules.[73] The Congressman's inquiry had been stimulated by a request for assistance by KIST's Board Chairman, Edward G. Butler, who complained that the Board's deferral of this case pending the outcome of settlement negotiations between the parties was delaying a decision in this proceeding.[74]

37. Based on KIST's reply to Family's petition and our review of the material on record, we will not add the requested issue. Where the facts are not obscure or in dispute, an evidentiary hearing is not needed. *Stone* v. *FCC*, 466 F.2d 316, 322-323 (D.C. Cir. 1972). Both KIST and Butler

[72] 47 CFR §1.1225 bars the solicitation of *ex parte* contacts seeking to address the merits of a case; §1.1227(e) goes so far as to bar the solicitation of *ex parte* contacts going to the status of a case.

[73] *See* Letter of August 15, 1984 from Edward J. Minkel (per Thomas P. Campbell) to the Honorable Alfred A. McCandless (Attachment to Family Petition).

[74] *See* Letter of July 23, 1984 from Edward G. Butler to Congressman Alfred A. McCandless which concluded: "Anything you could do to help would be greatly appreciated." It is explained that, following oral argument before the Board in which we suggested that the parties settle amicably, we were advised by letters of April 20, 1984 that the parties were attempting to negotiate a settlement of the case. Unfortunately, by letter of June 12, 1984, the Board was advised in writing by counsel that an agreement was unlikely, to which we responded that we would proceed to consideration of the case. *See* Letter of June 19, 1984 from Review Board Chief for Law, Allan Sacks, to Jonathan L. Weiner, Esq. (copies to counsel).

admit that Butler solicited the assistance of Congressman McCandless in compelling a decision,[75] and Butler's letter to the Congressman might suggest to some a violation of Section 1.1277(e). But, as the court observed in the recent *Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982), the Commission's concern over status inquiries makes " ... a necessary exception to the prohibition of *ex parte* contacts for congressional inquiries directed to administrative delay." *Id.*, at 129. *See also Davison Communications Corp.*, 53 RR 2d 223 (1983).[76] We recognize that the *Amigos Broadcasting* court was concerned that, although the written communications of record between the applicant and a U.S. Senator were inoffensive, certain oral conversations between the Senator's staff and FCC staff might have been explored more deeply.[77] Here, however, there is no evidence or claim of oral communications with decision-making FCC personnel.[78] None of the other parties seeks an *ex parte* issue, and Family has neither replied to KIST's opposition nor suggested that the record on this matter is either incomplete or inaccurate. Further inquiry over this matter would be doubtlessly unproductive.

Conclusion

38. Our ultimate choice of a permittee in this case is obviously hinged heavily on our rejection of the Family and Sunland ownership integration proposals. These are serious actions, we know, and a few final words of explanation may be due. We acknowledge that there may be some surface tension between the precedent (a) that demands a penetrating look beyond paper organizational constructs when the empirical evidence suggests a very different regime and where *de facto* control appears comfortably lodged in other quarters (*see Henderson* and *Berryville, supra*) and (b)

[75] *See* KIST Opposition to Petition at 4-5; Butler affidavit of August 24, 1984 (Opposition, Attachment B).

[76] We note that while Butler complained to Congressman McCandless that our deferral of this case pending settlement negotiations has delayed the case, Congress itself recently relaxed 47 U.S.C. §311(d) because of its view that settlements greatly expedite proceedings involving mutually exclusive applicants. *See* H. Rep. 97-765, 97th Cong., 2d Sess. 49-50 (1982). We agree with Congress and actively encourage settlements which would terminate a comparative case and telescope the delivery of new broadcast service. Ironically, Butler's actions have held up the release of this decision while we awaited the completion of the pleading cycle on the *ex parte* allegations and considered the claims and responses filed by the parties.

[77] *See* 696 F.2d at 130.

[78] We observe that Butler's letter to the Congressman might have skirted the merits when he complained that "[w]e have been given to understand that the Review Board hesitates to make a decision on this case because two of the applicants (including Sunland) have minority involvement, which could pose some legal problems." On the whole, however, and in context, it seems clear that Butler's communication to Congressman McCandless was directed to administrative delay.

recent Commission policies such as those discussed in the 1982 *Minority Ownership* statement noted in para. 20, *supra*, which accept the proposition that certain types of principals who contribute no venture capital to a particular applicant may still be considered "controlling," all other *prima facie* indicia being wholly congruent. Yet, beneath that surface, we believe that no fundamental inconsistency is present and that the Commission continues to demand that applicant principals who hold out to be substantial or controlling owners possess the *de facto* ownership interests (and not merely "nominal" interests) that their *de jure* status implies, particularly in the comparative setting where ownership integration and, now, minority or female enhancements loom so prominently. *See, e.g., West Michigan Broadcasting, supra* note 26. Because of that prominence in comparative licensing cases, we will continue to uniformly apply the *Henderson* and *Berryville* principles to help ensure the integrity of our policies and processes, a stated concern of the Commission in this delicate area. *See Minority Ownership In Broadcasting, supra*, 92 FCC 2d at 855 (Commission will be alert to reject " 'sham' arrangements").[79] From the standpoint of minority ownership, we believe that nothing would more swiftly bury the Commission's preferential treatment policies in an avalanche of contumely than our uncritical acceptance of the applications of roving sharp-shooters such as Family's Jack Dalton of Tennessee who have cynically calculated that even, at worst, a minority share of a southern California television construction permit worth — right off the printing press — many millions of dollars is a sufficiently lucrative target and hoped to convert a bulls-eye into a multiple return on initial investment. Indeed, Dalton brashly admits that to be his game.[80] Sunland's Jack Hodin of Scranton, Pennsylvania, while less "philanthropic," is practically no different. Neither entrepreneur has the slightest interest in serving the "public interest" in Riverside, California; only their own interests in the fastest dollar west of Las Vegas.

39. All decisionally significant exceptions have been considered. KIST, Bethel and Sunland are entitled to a very slight preference over Family under the diversification criterion. Only KIST and Bethel have been credited with fulltime quantitative integration credit (37.49% and 33.3% respectively), entitling them to moderate integration preferences over the other qualified applicants. *See Nuance Corp.*, 85 FCC 2d 412, 419 (Rev.

[79] Even in *Alexander S. Klein, Jr., supra*, where the gift of stock to the former minority employee was a mere 5%, the Commission stated that the " . . . proposal merits especially close scrutiny," 86 FCC 2d at 430, and that the prospect of exploitation of the Commission's racial preference policy there was "troublesome." *Id.*, at 431.

[80] *See I.D.*, para. 105 (*citing* Tr. 2274); *see also* Tr. 2276-2277 (Dalton testifies that despite personally bearing all expense of prosecuting application and constructing station, his marginal share of a potentially winning applicant was better than "nothing.")

Bd. 1981), where an applicant with 26% fulltime integration credit received a moderate preference over an applicant with no fulltime integration credit. And KIST prevails over Bethel on integration criterion because of its slightly superior qualitative attributes. *See supra* para. 31. No other preferences or demerits have been given. Having weighed these factors, we find that KIST is the preferred applicant under the Commission's comparative *Policy Statement.* While its margin over Bethel is very narrow, it nonetheless is enough to win. *See Alexander S. Klein, Jr., supra,* 86 FCC 2d at 432 (5% minority-female ownership by winning applicant is dispositive).

40. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed by United American Telecasters, Inc. on February 17, 1984, IS GRANTED, and the amendment IS ACCEPTED, and that its petitions for leave to amend filed on April 23 and August 15, 1984, ARE DISMISSED as moot; that the petitions for leave to amend filed March 20 and May 14, 1984, by Riverside Family Television, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and the petition for leave to amend filed August 29, 1984, by KIST Corp. IS GRANTED, and the amendment IS ACCEPTED; and

41. IT IS FURTHER ORDERED, That the Request for Official Notice and Contingent Petition to Enlarge and to Reopen the Record filed December 29, 1983, by Riverside Family Television, Inc. IS DISMISSED; that the Contingent Motion to Reopen the Record and to Enlarge the Issues Against United American Telecasters, Inc. filed December 30, 1983, by Sunland Communications Company IS DISMISSED; that the Contingent Petition to Reopen the Record filed March 6, 1984, by KIST Corp. IS DISMISSED; and that the Contingent Petition to Add Ex Parte Issues filed August 23, 1984 by Riverside Family Television, Inc. IS DENIED; and

42. IT IS FURTHER ORDERED, That the application of KIST Corp. (File No. BPCT-810717KK) for authority to construct a new television station in Riverside, California, IS GRANTED; that the applications of Sunland Communications Company (File No. BPCT-810720KL), Bethel Broadcasting, Inc. (File No. BPCT-810720KM), Riverside Family Television, Inc. (File No. BPCT-810720KO) and United American Telecasters, Inc. (File No. BPCT-810720KQ) ARE DENIED; and that the applications of Ettlinger Broadcasting Corporation (File No. BPCT-810720KK) and Channel 62, a Limited Partnership (File No. BPCT-810720KN) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Kist Corp. Riverside, California	BC Docket No. 81-863 File No. BPCT-810717KK
Ettlinger Broadcasting Corporation Riverside, California	BC Docket No. 81-866 File No. BPCT-810720KK
Sunland Communications Company Riverside, California	BC Docket No. 81-867 File No. BPCT-810720KL
Bethel Broadcasting, Inc. Riverside, California	BC Docket No. 81-868 File No. BPCT-810720KM
Channel 62, A Limited Partnership Riverside, California	BC Docket No. 81-869 File No. BPCT-810720KN
Riverside Family Television, Inc. Riverside, California	BC Docket No. 81-870 File No. BPCT-810720KO
United American Telecasters, Inc. Riverside, California	BC Docket No. 81-871 File No. BPCT-810720KQ
For a Television Construction Permit	

Appearances

James E. Greeley and *Peter Gutmann*, on behalf of Kist Corp.; *Stanley S. Neustadt* and *Robert C. Burns*, on behalf of Ettlinger Broadcasting Corporation; *Todd D. Gray, Daniel W. Toohey, Linda Hicks* and *John R. Feore, Jr.*, on behalf of Sunland Communications Company; *Edward J. Smith, Jr.* and *A. Thomas Carroccio*, on behalf of Bethel Broadcasting, Inc.; *A. Harry Becker*, on behalf of Channel 62, A Limited Partnership; *Jonathan D. Blake, John J. McKetta, III* and *Jonathan L. Weiner*, on behalf of Riverside Family Television, Inc.; *Seymour M. Chase, Joyce L. Ausbeck, Harry F. Cole, David F. Tillotson* and *Pamela Stanton Baron*, on behalf of United American Telecasters, Inc.; and *Stephen Yelverton*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: October 27, 1983; Released: November 4, 1983

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Kist Corp. (Kist), Ettlinger Broadcasting Corporation (EBC), Sunland Communications Company (Sunland), Bethel Broadcasting, Inc. (Bethel), Channel 62, A Limited Partnership (Channel 62), Riverside Family Television, Inc. (Family) and United American Telecasters, Inc. (United), each seeking authorization to build a new television station to operate on Channel 62 at Riverside, California.[1]

2. In the Hearing Designation Order, 46 *Fed. Reg.* 62936 (December 29, 1981, the Commission, by the Chief, Broadcast Bureau, designated the competing applications for hearing in a consolidated proceeding on the following issues:[2]

(1) To determine with respect to Sunland Communications Company:

(a) whether the applicant has available an additional $2,026,593 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(2) To determine with respect to Bethel Broadcasting, Inc.:

[1] Applications by Riverside Telecasters, Inc., Pan-Pacific Broadcasting, Inc. and Focus Broadcasting of Riverside, Inc. were dismissed by the Presiding Judge with prejudice pursuant to each applicant's request. *Order*, FCC 82M-1373 (released April 28, 1982; and *Order*, FCC 82M-2471 (released August 13, 1982).

[2] The issues directed at the three applicants who are no longer parties to this hearing are not enumerated.

(a) whether the applicant has available an additional $1,327,800 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(3) To determine with respect to Channel 62, A Limited Partnership:

(a) the information required by Tables I and II, Section II, FCC Form 301 with respect to officers, directors, and stockholders of Channel 62, Incorporated and the Greater Riverside Chambers of Commerce;

(b) the information required by questions 17(1) - 17(4), Section II, FCC Form 301;

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is legally qualified;

(d) the cost of purchasing or leasing land for 15 months;

(e) whether the applicant has available an additional $1,206,365 plus the costs of purchasing or leasing the land;

(f) whether, in light of the evidence adduced pursuant to (d) and (e) above, the applicant is financially qualified.

(4) To determine with respect to United American Telecasters, Inc.:

(a) whether the applicant has available $2,187,285 for its construction and three month operating costs;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(5) To determine whether there is a reasonable possibility that the tower heights and locations proposed by Sunland, Bethel, and United would constitute a hazard to air navigation.

(6) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(7) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order*, FCC 82M-1645 (released May 24, 1982), the Presiding Judge added the following issues with respect to the applicants who remain parties to this proceeding:

(6) To determine whether Bethel Broadcasting, Inc. has violated Section 73.3514 of the Commission's Rules and, if so, the effect thereof on this applicant's comparative qualifications to be a licensee of the Commission.

(7) To determine whether Channel 62, A Limited Partnership has violated Section 73.3514 of the Commission's Rules and, if so, the effect thereof on the applicant's comparative qualifications to be a licensee of the Commission.

(8) To determine whether Channel 62, A Limited Partnership has violated Section 73.3526 of the Commission's Rules and, if so, the effect thereof upon the applicant's basic or comparative qualifications to be a Commission licensee.

(9) To determine whether the staff proposed by the Ettlinger Broadcasting Corporation is adequate to effectuate its operating proposals and, if not, whether this applicant is qualified to be a licensee of the Commission.

(10) To determine whether Riverside Family Television, Inc. has violated Section 73.3526 of the Commission's Rules and, if so, the effect thereof upon the applicant's comparative qualifications to be a Commission licensee.

(11) To determine whether the application and subsequent amendments of Sunland Communications Company were executed and certified in accordance with the Commission's requirements and, in light of the evidence adduced, the effect thereof on the applicant's basic or comparative qualifications to be a licensee of the Commission.[3] [4]

4. By *Order*, FCC 82M-1410 (released May 3, 1982), the Presiding Judge granted a "Motion for Summary Decision" by United on the air hazard issue (Issue 5) and resolved that issue in United's favor. By *Memorandum Opinion and Order*, FCC 82M-2394 (released August 3, 1982, the Presiding Judge granted Sunland's "Motion for Summary Decision" on the certification issue (Issue 11) and resolved that issue in Sunland's favor. By *Order* FCC 82M-2786 (released September 14, 1982, the Presiding Judge granted Sunland's "Motion for Summary Decision" on the financial issue (Issue 1) and resolved that issue in Sunland's favor.

5. Prehearing conferences were held on March 17, 1982, April 2 and 28, 1982, May 10, 1982 and July 16, 1982. Admissions sessions were held on September 8 and 9, 1982. Hearing sessions were conducted on September 14, 15, 16, 17, 20, 21, 22, 23, 24, 28 and 29, 1982. A posthearing conference was held on October 14, 1982. A rebuttal hearing session was conducted on October 20, 1982. The record was closed by Order released January 27, 1983 (FCC 83M-354). Proposed findings of fact and conclusions of law were filed by the applicants on January 7, 1983 and reply findings and conclusions were filed on February 18, 1983.[4a]

Findings Of Fact

Qualification Issues

Issue 2 - Bethel Financial Qualifications

6. Bethel's cost of constructing and operating its proposed station through the first three months on the air will be $1,408,550. (Bethel Ex. 4). From its proposed equipment supplier, Bethel will have available net deferred credit totaling $759,656. (Bethel Ex. 4). JP Associates, Bethel's proposed equipment supplier, is an established supplier capable of

[3] The added issues have been numbered 6 - 11 and present issues 6 - 7 will be renumbered 12 and 13.

[4] The burdens of proceeding and proof on added issues 6, 7, 9, 10 and 11 were placed on the respective applicants. The burden of proceeding on added issue 8 was placed on Pan-Pacific, with the burden on proof placed on the applicant.

[4a] A "Motion To Enlarge" was filed April 15, 1983 by Channel 62. An opposition was filed April 28, 1983. A "Petition To Reopen The Record And To Enlarge The Issues" was filed April 27, 1983 by KIST. Responsive pleadings were filed on May 11, 1983. The motion and the petition were denied by *Order*, FCC 83M-1930, released June 14, 1983.

meeting its commitment to Bethel. (Bethel Ex. 10). This capability is confirmed by the stated willingness of Bogner Broadcast Equipment Corp. and Harris Corporation to provide their equipment to JP Associates on deferred credit basis (Bethel Ex. 12). Bethel also has available to it existing capital in the amount of $10,000. These earmarked funds are retained on deposit at Security Pacific National Bank (Bethel Ex. 4).

7. Bethel's president, Carl E. Vaughn, undertook to obtain a commitment for the additional funds, approximately $638,894, necessary to meet Bethel's construction and first quarter operating costs (Tr. 1348-50). On December 23, 1982, DeAnza National Bank, together with Golden Pacific National Bank and Gateway Western Bank, issued a commitment letter for a participation loan to Bethel in the amount of $750,000. As repayment of that loan will not begin until 120 days after the proposed station begins operation, the full amount of the loan will be available to Bethel.

8. On January 5, 1983, Bethel proffered both an amendment to the financial portion of its application and a reformed Hearing Exhibit No. 4 (Financial Qualifications). The application amendment and the reformed hearing exhibit demonstrate Bethel's ability to meet its financial requirements of $1,408,550 by relying on existing capital ($10,000), deferred equipment credit ($759,656) and the loan commitment ($750-000), which totals available financial resources of $1,519,656. (Reformed Bethel Ex. 4).

Issue 3(a) to (c) - Channel 62 Legal Qualifications

9. A legal qualifications issue was specified against Channel 62 on the basis of missing information in Section II of its application. Missing was the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Greater Riverside Chamber of Commerce (Chambers). Chambers holds 100% of the stock of Channel 62, Incorporated. Also missing was the information required by questions 17(1) through 17(4) of Section II relating to the other media interests of such officers, directors and shareholders of Channel 62, Incorporated and the Chambers.

10. The information has been supplied by Channel 62 in amendments and in Channel 62 Exhibits 2, 4, 5, 6 and 7. This information is reflected in the description of the Channel 62 applicant found at Findings 91-94 infra.

Issue 3(d) to (f) - Channel 62 Financial Qualifications

11. The Designation Order, 46 Fed. Reg. at 62938, determined that Channel 62's cost of construction and operation for three months would be $1,268,143 plus the cost of purchasing or leasing land for five months. According to Channel 62 Exhibit 18, the cost of rental for the station's studio facilities would be $2,500 per month, while the cost for leasing the transmitter site would be $1,000 per month. The total cost to construct

and operate this station for three months would thus be:

Cost in designation order	$1,268,143[5]
Rental of studio facilities (5 months)	12,500
Rental of transmitter site (5 months)	5,000
	$1,285,643

12. To meet this cost of $1,285,643, Channel 62 proposes to rely on $150,000 from its limited partners and a bank loan in the amount of $2,000,000 from the Riverside National Bank.

13. With respect to its reliance on its limited partners for contributions of $150,00 toward the prosecution of its application, Channel 62 has submitted balance sheets for each of its proposed contributors showing the availability of funds to make their respective capital contributions. While these balance sheets, in some cases, were somewhat dated, Channel 62 submitted affidavits from these individuals stating that the submitted balance sheets reflected their current financial position (Channel 62 Exs. 19-29; 33-41).

14. Channel 62 submitted a letter from the Riverside National Bank dated January 29, 1982 stating that the bank "would be pleased to consider participating in a loan of $2,000,000." (Channel 62, Amended Ex. VI). The bank qualified its participation by noting that it "would be conditioned upon our ability to review and approve the financial details of this loan prior to funding, including but not limited to proposed guarantors, collateral availability and cash flow requirements. Moreover, since we are unable to totally fund your request ourselves, the bank's participation will be predicated upon our ability to obtain additional participants willing to accept the proposed terms." (*Id.*).

15. Subsequently, in response to questions raised at the hearing, Channel 62 submitted two further letters from the Riverside National Bank clarifying some of the terms of the first letter. The bank stated in its letter dated September 10, 1982 that its legal lending limit was currently $600,000 (Channel 62 Ex. 32), and that "Riverside National Bank has engaged in loan participation in the past, although our participations were somewhat smaller than the Channel 62 proposal." (Channel 62 Ex. 42). Finally, the bank stated in its letter dated October 1, 1982 that it "would consider a deferment of interest as well as principal," provided "such deferment could not exceed six months from the initial date of funding of the proposed loan." (Channel 62 Ex. 42).

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[5] This amount includes the $350,000 downpayment and the $119,875 representing four installment payments on the Harris equipment credit package, as well as $187,610 for equipment to be purchased for cash.

16. Channel 62 declined to call a bank official to testify on its behalf. Arthur Pick, one of Channel 62's general partners,[6] testified to the best of his knowledge that the bank had not contacted any other banks regarding their participation in the proposed loan to Channel 62 (Tr. 1876).

Issue 4 - United Financial Qualifications

17. United is required to show the availability of at least $2,182,550 for its construction and first-three-months operating costs. To make this showing, United is relying upon net deferred equipment credit of $877,500 (which is not contested) and a $2,000,000 loan from the West Olympia Bank (a California bank) which, after subtracting interest payments for the first year, would yield United $1,680,000. (United Ex. 1). United is not relying upon any contributions from its shareholders and no statement regarding its shareholders' financial condition were submitted. United's principals have stated that if necessary they will personally guarantee and provide collateral for a loan to United (Tr. 2445, 2515-16, 2606-7, 3892, 2936-37, 2977), but no showing has been made regarding the amount of collateral which could be made.

18. The August 26, 1982, West Olympia Bank letter upon which United relies states that if United's application is granted, the bank is "prepared to syndicate loans with our correspondent banks to extend your company in sums up to $2,000,000 for the construction and operation of the station." The letter goes on to state, "[e]ach loan will, of course, be subject to the condition that all reasonable and ordinary credit criteria of the bank are met at the time you request a formal lending commitment." (United Ex. 1, Attachment A).

19. By banking standards, the West Olympia Bank is a relatively small bank, with $22,000,000 in assets (Tr. 2314). Its credit limits are correspondingly small—approximately $150,000 to $160,000 for unsecured loans and $300,000 for secured loans (Tr. 2315, 2266, 3323). These limits are imposed by the state law under which the bank is chartered. Secured loans would normally be those with sufficient collateral in the nature of bank accounts or first trust liens, or loans guaranteed by government agencies (Tr. 2316, 3323). Loans would be considered unsecured where there is no collateral, where there is a second trust on property (Tr. 2315-16), where the collateral is stock in a closed corporation (Tr. 2323), or where there is merely personal guarantees (Tr. 2316). Gook Sun Han, a Director and 25% stockholder of United and a Director of the West Olympia Bank and member of its senior loan committee (United Ex.

[6] The other general partner is Channel 62, Incorporated, a California business corporation, the stock of which is owned 100% by the Greater Riverside Chambers of Commerce (Chambers), a non-profit corporation (Tr. 1905). Pick is Executive Vice President of the Chambers (Channel 62 Ex. 1).

8, pp. 1-2) testified that the largest loans he was aware of the bank having made were in the range of $180,000 to $200,000 (Tr. 2455).

20. The West Olympia Bank could not, on its own, loan United the $2,000,000 United has requested. Thus, as indicated in its letter to United, the bank would have to syndicate the loan to several other banks in order to come up with the money required by United. Before participating in a loan, the other banks would require information relative to the credit worthiness of the applicant (Tr. 3273). The bank has made no arrangements whatsoever to syndicate United's loan at this time (Tr. 3277). Although Mr. J. T. Kim expressed confidence that the bank could syndicate the loan, the bank has never managed a participatory loan in his experience. (*Id.*)[7]

21. The August 26 bank letter does not contain any specific reference to a requirement of collateral for the loan. An August 16 letter from the bank to United however, stated that a loan from the bank to United would require "satisfactory collateral." (Family Ex. 13). The author of the August 16 and August 26 letters, Mr. J. T. Kim, stated that the term "collateral" was deleted from the second letter because the bank had additional criteria which would have to be met before taking down the loan, all of which could not be expressed in the letter, and he thought it would be more appropriate simply to say generally that the loan would be subject to "the ordinary credit criteria of the bank." (Tr. 3258-59). Mr. J. T. Kim stated that general banking practice would require collateral and that such banking practices are part of his bank's credit criteria (Tr. 3335). While stating that no definite decision had been made regarding whether the bank would ask for collateral or what amount, Mr. J. T. Kim stated that as far as he was concerned, the bank should ask for collateral (Tr. 3264-65). Based on present practices, collateral for a $2,000,000 loan would be in the order of approximately $3,000,000 (Tr. 3293). The decision on whether or not to ask for collateral will be made by the bank's loan committee (Tr. 3264) which has not yet considered the loan in question (Tr. 3352).

22. As of the time of the hearing, the West Olympia Bank had very little information regarding United. Thus, it had neither received nor reviewed personal income statements, personal balance sheets or any statement of the net worth of United's respective principals, nor had it ever seen a balance sheet or statement of net worth from United (Tr. 3278). In addition, the bank was unaware of the fact that United's equipment supplier would have a first lien on United's equipment (Tr. 3295). The only financial material received by the bank were projections of

[7] According to Ms. Woo-Chang Lee England, Vice President and loan officer, the bank has participated in loans syndicated by other banks (Tr. 2325-26).

income and expenses from the United station should the application be granted (Tr. 3353-55).

23. Mr Han[7a] was instrumental in acting as an intermediary between United, with which he was about to become formally associated, and the bank in obtaining a loan letter (e.g., Tr. 3241-42). Under the California Financial Code, in the absence of special security arrangements (not indicated here), a bank cannot give a loan in excess of $25,000 to a corporation of which one of the bank's directors holds 10% or more of the stock. *Cal. Financial Code* § 3371 (West 1981 and 1982 Supp.). Mr Han stated that if it is necessary, he will resign from the bank so that United can obtain a loan (Tr. 2444-45).

Issue 5 - Sunland, Bethel Air Hazard

24. Sunland proposes a tower site at the Sunset Ridge Electronics site, three miles northwest of San Antonio Heights in Los Angeles County, California. On January 22, 1982, the FAA issued its determination of "no hazard" with respect to Sunland's proposed tower (Sunland Ex. 6).

25. By amendment accepted by *Order*, FCC 82M-1410 (released May 3, 1982), Bethel specified a transmitter site located immediately adjacent to existing communications towers and buildings on Skyland Peak near Crestline, California. On May 5, 1982, the Federal Aviation Administration issued its determination that Bethel's proposed tower and antenna would not constitute a hazard to air navigation (Bethel Ex. 8 at 1, 2).

Issue 6 - Bethel Violation of Section 73.3514

26. Bethel's application on FCC Form 301 contained the following omissions: (1) the information required by Items 4(a) and 4(e) of Section III; (2) a response to Item 23 of Section IV-B; (3) exhibits E-3 and E-4; and (4) responses to Items 15 and 16 of Section V-C (Bethel Ex. 6 at 1). These deficiencies in Bethel's original application were corrected by amendments filed by Bethel on January 28, 1982 and March 24, 1982 (Bethel Ex. 6 at 1).

27. In 1977, Bethel decided to seek a television broadcast station to serve Riverside, California. At that time, they retained an attorney to act as Washington communications counsel. Bethel relied upon that counsel both to guide it through the rulemaking allocating Channel 62 to Riverside, and to guide Bethel with regard to any application (Bethel Ex. 6, pp. 1-2). However, not known to Bethel, its original counsel was disbarred from the practice of law, and abandoned his practice (Ex. 6, p. 2 and Tr. 1407-8).

[7a] As previously noted, Mr. Han is a Director and 25% stockholder of United and a Director of the West Olympia Bank and member of its senior loan committee.

28. Bethel's principals were unaware of any application activity regarding Channel 62 until July 1981, when its president, Carl E. Vaughn, noticed an article on the subject in the *Riverside Press Enterprise*. So alerted, Bethel contacted its Washington counsel, who stated he had ceased handling communications matters and would not assist Bethel in the application process (Ex. 6, p. 2).

29. Upon learning of its abandonment by original counsel, Bethel contacted substitute counsel on the afternoon of July 14, 1981, four business days before the "A" cut-off date. Under the direction of new counsel, Mr. Vaughn gathered available material and information and flew to Washington, D.C. on the cut-off date, July 20, 1981. Working with counsel, and making every effort to prepare a complete and accurate application, Bethel prepared and filed its application that day (Bethel Ex. 6 and Tr. 1397).

30. Within 10 days after filing its application, Mr. Vaughn reviewed the application, but did not notice any omissions (Tr. 1398). Mr. Vaughn also discussed the engineering portion of the application with Bethel's consulting engineer, who was relied on for guidance on all technical matters, but received no indication of any need to amend or supplement the engineering submission (Tr. 1420-21). Further, Mr. Vaughn reviewed the application in anticipation of the "B" cut-off. As a result of that review, an amendment was prepared and filed on the "B" cut-off date (Tr. 1419).

Issue 7 - Channel 62 Violation of Section 73.3514

31. The Channel 62 application as filed did not contain certain information required by Section II of FCC Form 301. It was missing the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers. It was also missing the information required by questions 17(1) through 17(4) for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers.

32. This information was supplied by Channel 62 in amendments dated July 12, 1982 and August 13, 1982 (Tr. 1971). Mr. Pick explained that it took so long for Channel 62 to supply the missing information because much of it came from volunteers. The Chambers must rely on the sense of responsibility of its members. Some of them came to the organization fully prepared to respond to its needs with due diligence. Others are reluctant to participate actively. Also, various Channel 62 participants needed to consult with their attorneys and accountants concerning the project. It therefore took a considerable period of time to collect this information (Tr. 1971-72).

Issue 8 - Channel 62 Violation of Section 73.3526

33. On January 12, 1982, Mr. David Bantle, an employee of a principal of Pan-Pacific Broadcasting, Inc., which at the time was a competing applicant in this proceeding, visited the offices of the Greater Riverside Chambers of Commerce in order to inspect the public file of Channel 62 which was to be located there (Tr. 3202). Mr. Bantle approached individuals working in the other office and asked to see the public file for Channel 62 (Tr. 3202-03). Although Mr. Bantle could not remember the precise wording of the conversation, he testified that one of the individuals to whom he spoke asked him if he worked at the Federal Communications Commission to which he responded that he did not (Tr. 3204). The individuals with whom Mr. Bantle spoke apparently did not understand what the public file was (Tr. 3209) and told Mr. Bantle that he would have to speak with Mr. Pick, Executive Vice President of the Chambers and Corporate Secretary of Channel 62, Inc., one of the general partners of Channel 62 (Tr. 3205).

34. When Mr. Bantle returned, he spoke to Mr. Pick's secretary and again asked to see the public file for Channel 62 (Tr. 3211). Mr. Pick's secretary was about to give the public file to Mr. Bantle, when Mr. Pick, who was in an adjoining room, interrupted and told her not to do so (Tr. 1483, 3212). Mr. Pick asked Mr. Bantle for identification and Mr. Bantle provided him with his driver's license (Tr. 1985, 3213-14). There was also apparently some discussion between Mr. Bantle and Mr. Pick regarding whether Mr. Bantle was a representative of the Federal Communications Commission, although the precise exchange between Mr. Bantle and Mr. Pick on this subject is in dispute (Tr. 1488, 1985, 3215-16). Mr. Pick told Mr. Bantle that he would have to consult with his Washington counsel, and if proper, Mr. Pick would make the files available to Mr. Bantle on the following day (Tr. 1426, 3216). Mr. Pick spoke with his counsel soon thereafter and was instructed to make the files available to Mr. Bantle (Tr. 1426). Mr. Bantle, however, did not return to look at the files (Tr. 3217).

35. Mr. Pick testified that he did not give the files to Mr. Bantle immediately because he was under the impression that Mr. Bantle had previously misrepresented himself as being from the Federal Communications Commission (Channel 62 Ex. 1, p. 10).

Issue 9 - EBC Staffing

36. EBC proposes a staff for its television station of 6 full-time and two part-time employees. The staff would be broken down as follows:

Number	*Position*	*Time*
1	General Manager	full-time
1	Bookkeeping/Traffic	full-time
1	Sales Manager	full-time
3	Engineering/Technical	full-time
1	Engineering/Technical	part-time
1	Salesman	part-time

37. The station is proposed to be on the air 7 days each week, 12 to 13 hours per day (12:00 Noon through 1:00 a.m.). EBC contemplates that it will seek an STV operator to program the station from 8:00 p.m. through the end of the broadcast day (Tr. 991-92). EBC proposes to have only a limited amount of programming which will be produced at the station. This will be a nightly ten-minute news program and a weekly one hour talk show produced and announced by EBC's General Manager, Kathleen Keep (Tr. 1017, 1202-3, 1212).

38. With respect to Ms. Keep, the proposed General Manager, EBC proposes that she would perform the functions of station manager, news and public affairs director and program director (EBC Ex. 4 at 1). Testimony elicited at the hearing shows that Ms. Keep will have at least the following specific duties at the station: ascertainment (Tr. 1004); representing the station in the community (Tr. 1032); going into the community to gather information for the station's news and public affairs programming (Tr. 995, 1218); editing, producing, writing scripts, and doing the on-air portions of the news and public affairs programming (Tr. 995, 1192); scheduling the station's programming (Tr. 1215); answering telephones, preparing agendas for station personnel and other menial tasks (Tr. 1191); and supervising all station employees (Tr. 987). Ms. Keep has never done TV program production work (Tr. 1192).

39. The engineering staff presence during the week is as follows:

Monday - Friday:

Until 6:00 p.m.	—	1 studio engineer 1 ENG and studio engineer
6:00 p.m. 6:30 p.m.	—	2 studio engineers 1 ENG and studio engineer
After 6:30 p.m.	—	1 studio engineer

Saturday and Sunday:

Until 6:00 p.m.	—	1 studio engineer
6:00 p.m. - 6:30 p.m.	—	2 studio engineers
After 6:30 p.m.	—	1 studio engineer

(EBC Ex. 4).

40. The station's transmitter will be located on Box Springs Mountain in Riverside (Tr. 1007). The maintenance of the transmission equipment will be handled for a flat fee by an engineer/employee of Telas Broadcasting, which already uses the site for transmission (Tr. 1054-55).

41. The station engineers, in addition to maintaining and operating the station's broadcast equipment, will operate the cameras and studio production equipment during taping of public affairs/news segments (Tr. 1193) and commercials (Tr. 1075). One engineer will also take requests for announcements and civic appearances (Tr. 1032). In the absence of the General Manager, the engineer on duty will be in charge of the station (Tr. 1192). Also, each weekday one engineer will be assigned to ENG work, including coverage of local events and some reporting of same (Tr. 1076-78). This activity is expected to keep the ENG engineer away from the studio for the better part of the day. *Id.* In case of failure of studio equipment, programming would be switched to a standby tape machine while the station awaits arrival of its part-time engineer responding to an emergency call (Tr. 1196, 1054). Plans for dealing with technical difficulties arising when the part-time engineer is alone on duty (Saturday and Sunday, 6:00 p.m. to the end of the broadcast day) or otherwise occupied (doing ENG work Mondays and Tuesdays or unavailable during his off hours) apparently have not been made. There was no testimony as to handling transmitter difficulties. Engineers' absences due to vacations and illness will be covered by the part-time (32 hour) engineer working on a full-time basis (Tr. 1000-1001).

42. As to the engineering staff required for the taping of the programs and commercials produced by the station, John Ettlinger[8] initially stated that all such pre-taping would require the presence of three engineers (Tr. 999). He later modified this opinion, stating that three engineers (two manning cameras and one in the control room) would only be necessary during the "interview portion" of the program (Tr. 1018). Ms. Keep indicated that for the one hour interview show (that she expects to produce) three engineers would be needed in the studio and that she presumed they would spend more than one hour working to make an hour of programming (Tr. 1193, 1202-3). For the technical production of commercials a one-man crew would be used (Tr. 1075-6).

43. Ms. Keep testified that the interviews would generally be of three or four individuals (Tr. 1238-9). She and Mr. Ettlinger accept that taping must be done at the convenience and contingent to the availability of the guests (Tr. 999, 1193). However, Mr. Ettlinger expected the interviews to be taped on Saturday or Sunday evenings (Tr. 1017). Ms. Keep stated that the engineers' schedules will provide adequate time for them to carry out their functions (Tr. 1194). She then referred to the one-half hour projected

[8] Mr. Ettlinger, who holds 60% of EBC's stock, (EBC Ex. 1) sponsored the staff exhibit.

overlap in the weekday schedules during which time three engineers would be on hand (Tr. 1195). However, she refused to say that this half-hour would be sufficient for the station's taping activity, maintaining that "Mr. Ettlinger's idea of this, presenting this to you is obviously going to change." *Id.* She indicated that the schedules will be "fluctuated" as necessary. *Id.* In response to a question as to the number of hours a week expected of the engineers, Ms. Keep referred to a part-time engineer (other than the 32 hour individual) whose hours "will be determined by necessity" (Tr. 1220-21). Neither EBC's staffing proposal (EBC Ex. 4) nor its engineering schedule indicate a fifth engineer.

44. The weekday news program would require the ENG engineer to be outside the studio "more than he would be in" (Tr. 1076-7). The ten-minute program would require "about an hour and a half" preparation in the studio before airing. *Id.* That preparation "is strictly assigned" to the ENG engineer. *Id.* Ms. Keep would need two engineers for the taping or live production of the non-ENG portion of the program (Tr. 1203). She anticipates that one hour should be set aside for this activity (Tr. 1202-3, EBC Ex. 4, attachment). In response to a question as to plans for covering urgent local events (natural disasters, etc.), Mr. Ettlinger admitted that such a possibility had not been considered in the staff proposal (Tr. 1077-78). As presently proposed, the staff could not produce more than 15 minutes daily coverage of local public affairs (Tr. 996, 1023-24, 1080).

45. EBC intends to solicit and air local, regional and national advertising (Tr. 1058-59). The sales staff will consist of one full-time manager and one part-time salesman (EBC Ex. 4, p. 1). Mr. Ettlinger acknowledged that since the station will be the first local Riverside television outlet[9] it will have the added burden of "educat[ing] advertisers in the area to utilize the media." (Tr. 997). There will be no member of the staff especially charged with promoting the new station (Tr. 1031). (However, Ms. Keep, in addition to her other duties, will "go out and speak at Rotary and other functions" and appear at lunches and functions (Tr. 1032). Mr. Ettlinger could not estimate the volume of commercial announcements anticipated during the first year of operation (Tr. 1063).

46. Mr. Ettlinger admitted that he overlooked a secretary/receptionist in his staffing proposal and that a secretary/receptionist would have to be added within 30 to 60 days (Tr. 1084).

Issue 10 - Family Violation of Section 73.3514

47. Two amendments to the Family application, dated October 1, 1981 and October 20, 1981, were not placed in the Family public inspection file in a timely manner (Tr. 2238). Jack Dalton, Family principal, was responsible for the public file. He had an arrangement with his communi-

[9] Riverside has a population of 170,876.

cations consultants, Sterling Communications, that they would send all materials for the public file to Mr. Dalton and he would then forward them to the public file at the Riverside Public Library (Family Ex. 6 p. 2, Tr. 2236). Mr. Dalton never received copies of these two amendments; thus he did not forward them to the Riverside Public Library (Family Ex. 6, 2). In fact, the materials were not placed in the public file until a paralegal at Family's law firm (Family's new counsel) mailed the materials to the Public Library on February 16, 1982 (Family Ex. 3, p.2).

48. Mr. Dalton testified that he was involved in the preparation of at least one of the two amendments, and that he was aware that it had been filed (Tr. 2246, 2260-61). However, when he did not receive a copy of the amendment from Sterling, he did not ask them for a copy (Tr. 2247). He testified that he simply depended on them to send him a copy (Tr. 2261, 2266). He assumed that if the amendments were required to be placed in the file, Sterling would forward them to him with a letter informing him that the material should be placed in the public file (Tr. 2262). At the time, Mr. Dalton was not aware that all amendments to Family's application had to be placed in the public file (Tr. 2262).

49. Arrangements have now been made to forward all amendments to the Family application to its public inspection file at the Riverside Public Library (Family Exs. 4-6). Checks are made periodically with the librarian of the Public Library Reference Desk where the files are kept to make sure the public file remains complete and up to date (Family Exs. 4-6).

Comparative Issue

Kist Corp.

50. Kist, a California corporation, consists of the following stockholders, officers and directors (Kist Exs. 1, 2 and 3):

Shareholder	*Percentage of Ownership*	*Office*
Hugh B. MacCauley[10]	12.5%	Chairman
W. Carlos O. Fox	8.33%	President, Director
Harold R. Austin	8.33%	Director
Edward G. Butler	8.33%	Secretary/Treasurer, Director
Felice Cooper[10]	4.17%	Vice President-Programming, Director
Olin F. Koch	8.33%	Vice President-Administration, Director

[10] Mr McCauley and Ms. Cooper are husband and wife (Kist Ex. 1).

Clinton L. Cogbill	8.33%	Director
Scott Reynolds	--	Assistant Secretary
Willis H. Boyd	8.33%	Director
Helmut J. Dueck	8.33%	Director
Wayne Wauchtel	8.33%	Director
Donald C. Hubbs	8.33%	Director
	91.67%[11]	

51. No stockholder of Kist has any interest in any AM, FM or TV broadcast station or cable television system (Kist Ex. 4).

52. Five stockholders of Kist will be employed full-time at the station as follows: W. Carlos O. Fox as General Manager, Felice Cooper as Vice President-Programming, Edward G. Butler as Chief Financial Officer, Harold R. Austin as Assistant Director of Sales and Olin Koch as Vice President-Administration (Kist Ex. 5, p. 1). Two stockholders of Kist will be employed part-time (at least 20 hours per week) at the station as follows: Hugh B. MacCauley as Sales Account Executive and Clinton L. Cogbill as Sales Account Executive (Kist Ex. 5, p. 3).

53. *W. Carlos O. Fox* will be the General Manager of the proposed station. Mr. Fox will perform the duties customarily performed by the general manager of a station, overseeing and supervising the entire operation. The various department heads (sales, programming, engineering, administration and finance) will report to him (Kist Ex. 5, p. 1; Tr. 711). Mr. Fox lives at the present time at Homosassa Springs, Florida. He will move to Riverside in the event the Kist application is granted and work full-time at the station (Kist Ex. 1, p.1).

54. Mr. Fox is semi-retired (Tr. 708), but works as a management consultant at the present time (Kist Ex. 1, p. 1). Mr. Fox has experience in the communications common carrier field, but no broadcast experience apart from his work in the early 1950's involving constructing Voice of America stations (Kist Ex. 1, p. 1-3). His association with these broadcast stations ended at the time they went on the air (Tr. 710). Mr. Fox will terminate his management consultant role should the Kist application be granted (Tr. 707).

55. Mr. Fox claims to be an Hispanic (Kist 1, p. 1). However, Mr. Fox was born in Baltimore, Maryland (Tr. 703-705, 753) and has no immediate relatives living outside this country (Tr. 704-705). Of his four grandparents, only his paternal grandfather is of Hispanic heritage, having been born in Cuba (Tr. 703-704). Mr. Fox is not a fluent speaker of Spanish; Spanish was only spoken from time to time in his home by his father (Tr.

[11] Information concerning the additional 8.33% stock is not part of the record evidence in this hearing.

705). Mr. Fox also apparently has no connection with the local Riverside Hispanic community.

56. *Felice Cooper* is proposed to be Vice President-Programming of the station. She will be responsible for the program department, including the selection of programming and personnel for the department. She will chair a program committee which will meet weekly for the purpose of discussing programming plans (Kist Ex. 5, p. 1), and programming decisions will be made in consultation with the members of that committee (Tr. 949).

57. Ms. Cooper has been a resident of Riverside for five years (Kist Ex. 1, p. 10). With the exception of a few hours each month spent on certain business-related activities (Tr. 952), Ms. Cooper has no regular business or employment position (Tr. 952). Ms. Cooper intends to work a minimum of 40 hours per week at the station (Kist Ex. 1, p. 11).

58. Ms. Cooper was born in England. She was a part owner, director, and manager of the Whitehall Theater in London from 1951 to 1964; she became sole owner of the theater in 1964. From that time until she sold the theater in 1970, she was the managing director, supervising all phases of its operation (Kist Ex. 1, pp. 10-11). Ms. Cooper has no broadcast experience (Tr. 947). Ms. Cooper claims civic involvement as a member of the Red Cross, a member of the Humane Society,[12] and a member of the Officers Wives Clubs at Norton and March Air Force Bases. However, she does not devote any appreciable time to these activities (Tr. 947); nor does she describe herself as active in civic affairs. She describes her activities as purely social in nature (Tr. 949-51).

59. *Edward G. Butler* is proposed to be Chief Financial Officer at the station (Kist Ex. 5, p.1, 2). In that role, he will supervise the people engaged in the financial activities at the station, prepare its budget and financial plan, and do the coordination necessary to see that financial plans are followed by other departments of the station (Tr. 1091).

60. Mr. Butler currently resides in Riverside, and has resided in the Riverside area for fifteen years (Kist Ex. 1, p. 7). He is currently the Assistant Executive Director of Development and Community Relations for Riverside Community Hospital and Executive Director of Riverside Community Hospital Foundation (Kist Ex. 1, p. 7), but he will terminate these positions and work a minium of 40 hours per week at the station if the KIST application is granted (Tr. 1100-01). From 1966 through 1968 and from 1973 through 1974 Mr. Butler served as a member of the board of directors for United Way. From 1972 to present he has been Secretary/ Treasurer of the Monday Morning Group of Riverside. In 1974 and 1975 he was a member of the board of directors of the Rotary Club. From 1966

[12] Her membership in the Humane Society is the result of a monetary contribution made to the organization (Tr. 950).

to 1968 he was a member of the board of directors of the Riverside Chamber of Commerce. From 1970 to 1972 he was President and, from 1972 to 1974, a member of the board of directors of the Easter Seals/ Crippled Children's Society. He has also been a member of the Citizens University Committee, University of California, Riverside (Kist Ex. 1, p. 8).

61. *Harold R. Austin* is proposed to be the Assistant Director of Sales of the station (Kist 5, p. 1, Tr. 771). His duties there will be to head the sales department (Kist Ex. 5, p. 2), including the supervision of salesmen (Tr. 777).

62. Mr. Austin currently resides in Riverside and has resided in the Riverside area for the past 9 years (Kist Ex. 1, p. 4). Mr. Austin is currently engaged in the business of buying and selling investment securities (Kist Ex. 1, p. 4), but will terminate his present position and work at the station full-time should the Kist application be granted (Kist Ex. 1, p. 5, Tr. 774). Mr. Austin is Vice President of the Riverside chapter of the Air Force Association. He is Vice Chairman of the Military Affairs Committee of the Riverside Chamber of Commerce. He is a member of the Order of Daedalians (an association of military pilots) and the Retired Officers Association (Kist Ex. 1, p. 5).

63. *Olin F. Koch* is proposed to be the Vice President-Administration of the station (Kist Ex. 5, p. 2). Mr. Koch will have overall responsibility for the administration of the station including the bookkeeping aspects and coordination with the comptroller and the secretarial services (Tr. 869). He envisions his duties will include assisting the general manager in program planning, acquisition and development; responding to viewer complaints and concerns; serve as spokesman for the station in union matters; maintain communications with the community at large; and represent the station through participation in organizations such as the NAB, TVB and NATPE (Tr. 864-65).

64. Mr. Koch resides in Redlands, California, which is located approximately 10 miles from Riverside (Tr. 842-43). Mr. Koch is presently project manager of a firm engaged in the construction and managing of commercial and office properties (Kist Ex. 1, p. 13). He has held various administrative positions administrative positions in the Air Force (Tr. 873), but he has no broadcast experience (Tr. 846, 874). Mr. Koch is a member of the San Bernardino chapters of the Air Force Association and the Retired Officers Association (Kist Ex. 1, p. 14, Tr. 851). He is also a member of the Officers Club at Norton Air Force Base and the Norton Air Force Base Chapel (Kist Ex. 1, p. 14). In 1972 to 1974 he was a member of the San Bernardino chapter of the Society of Logistic Engineers (Kist Ex. 1, p. 14, Tr. 870-71, 851).

65. *Hugh B. MacCauley* is proposed to be a part-time Sales Account Executive at the station, working at least 20 hours a week (Kist Ex. 5, p. 3). Mr. MacCauley's duties will be to solicit advertising from the community (Tr. 913). He will be supervised by the Assistant Director of Sales, Harold Austin (Tr. 807, 908), and will also be subordinate to the station manager in his role as a salesman (Tr. 908-910). Mr. MacCauley will not supervise other employees (Tr. 907). Mr. MacCauley will not give up his present stockbrokering business, at which he works approximately 20 hours per week (Tr. 934-36).

66. Mr. MacCauley[13] was from 1977 to 1980 a member of the board of directors of the Rotary Club in Riverside, and he remains a member of that organization. He also remains a member of the Daedalian Society and the Air Force Association, in which he served as Vice President of the San Bernardino chapter from 1974 to 1976 (Kist Ex. 2, p. 2). However, Mr. MacCauley himself characterized these as "social organizations" and has no civic activities to which he devotes time (Tr. 926).

67. *Clinton L. Cogbill* is also proposed to work part-time (20 hours) at the station as a Sales Account Executive (Kist Ex. 5, p. 3). Mr. Cogbill perceives his role to be that of selling advertisements to the various merchants in the Riverside area (Tr. 828). He will be supervised in his endeavors by Mr. Austin, Assistant Director of Sales (Tr. 807), and will not have any supervisory role over other employees (Tr. 828). He will have no programming decision-making responsibility (Tr. 828-29), and he will not participate in decisions relating to personnel (Tr. 829).

68. Mr. Cogbill has served as President of the Redlands Boys Club and on the board of directors of the Redlands Kiwanis. He was a director of the Redlands Day Nursery, and has been a member of the board of directors of the Valley Prep School and Redlands, of which he was Vice President in 1978 (Kist Ex. 2, p. 4, 5).[14]

Ettlinger Broadcasting Corporation

69. EBC is a California corporation. Although no stock has been issued by the Corporation, 5,500 shares have been subscribed to by the following persons (EBC Ex. 1):

Principal	*Shares/Percent*	*Office*
John A. Ettlinger	3,300/60%	President
Kathleen C. Keep	1,100/20%	Vice President

[13] As noted *supra*, Mr. MacCauley is the husband of Ms. Cooper and they reside in Riverside.

[14] Mr. Cogbill lives in Mentone, California, 15 miles from Riverside. Redlands is 10 miles from Riverside (Tr. 826-27).

Charles Theodore	825/15%	Vice President
Greta Ettlinger	275/5%	Secretary/Treasurer

70. EBC itself hold no other broadcast licenses or authorizations. The only stock subscriber with other broadcast or media related interests is John A. Ettlinger. Mr Ettlinger is a 23.18% shareholder in Quality Broadcasting Corp., licensee of station KUDO-FM, Las Vegas, Nevada. Mr Ettlinger holds debentures in Quality Broadcasting Corp., which, if converted to stock, would increase his ownership interest to about 47% (EBC Ex. 2, p. 2, Tr. 978). Mr. Ettlinger is also a 6.37% stockholder in Forrest Broadcasting Co., which owns all of the stock of the licensees of stations KDON/KDON-FM, Salinas, California, and stations KBBQ/KBBY(FM), Ventura, California (EBC Ex. 2, p. 2).

71. *Kathleen Keep* is proposed to be the station's full-time General Manager (EBC Ex. 1). As General Manager of the proposed station, Ms. Keep will have responsibility for the day-to-day operations of the station, including the supervision of all station personnel. Ms. Keep will also perform the functions of station manager, news and public affairs director and program director. In addition, Ms. Keep will produce a nightly 10 minute news/public affairs program on current events in the "Inland Empire" area, of which Riverside is a part. Ms. Keep will also host a weekly talk show on important issues affecting the community of Riverside and the "Inland Empire" region (EBC Ex. 3, 4).

72. Ms. Keep is a resident of Joshua Tree, California, which is approximately 55 miles from Riverside (Tr. 1190). She expects to maintain that residence while working full-time at the station in Riverside (Tr. 1190). Ms. Keep will also obtain an apartment in Riverside (Tr. 1248).

73. Ms. Keep grew up and was educated within a 25 miles radius of Riverside. She is a graduate of Fontana High School and graduated with honors from Chaffey Junior College in Ontario, California in 1960 (EBC Ex. 3, p. 1). Ms. Keep is currently employed as a production manager at EMIA/Liberty Records, Los Angeles, California. Should the EBC application be granted, she will resign that position (EBC Ex. 3, p. 1-2). Ms. Keep is not now associated with any civic organization in the Riverside area (Tr. 1203).

74. John Ettlinger is proposed to spend one day per week at the station in a supervisory capacity and a minimum of 16 hours per week to program acquisition for the station (EBC Ex. 1). Mr. Ettlinger will hold no title at the station but will be responsible for supervising the construction of the station and supervising the General Manager once the station is constructed (EBC Ex. 2, p. 1: Tr. 987-89, 1014-15, 1079, 1082). In addition, Mr Ettlinger will be in charge of program acquisition (EBC Ex.2, p. 1).

75. Mr. Ettlinger is a resident of Beverly Hills, California, which is located approximately 52 miles from Riverside (Tr. 984). He intends to

maintain that residence if the Ettlinger application is granted (EBC Ex. 2, p. 1). Mr. Ettlinger is currently President and 100% owner of Medallion TV Enterprises, Inc.[15] and of Jett Advertising Agency[16] both located in West Hollywood, California. He devotes up to 16 to 24 hours a week working at Medallion (Tr. 973). Jett requires his attention for about two hours a month, except when it is involved in producing commercials. This occurs infrequently but demands an additional unspecified amount of his time. He is also currently self-employed as a producer and director of motion picture films and television programs. This activity at times involves travel outside the Los Angeles area and at time requires his round the clock attention (Tr. 972). From 1967 to 1973, Mr Ettlinger was Executive Vice President of station KSHO-TV, Las Vegas, Nevada. He was in charge of program acquisition and the construction of a new facility for that station. From 1977 to March 1981, Mr Ettlinger was President, Treasurer and director of Quality Broadcasting Corp., licensee of station KUDO-FM, Las Vegas, Nevada. In that capacity Mr. Ettlinger had primary responsibility for the construction of station KUDO-FM and its operation after it began broadcasting (EBC Ex. 2, pp. 1-2).

76. Mr Ettlinger is a long-time member of the board of directors and past President of Viking Charities Funds of Beverly Hills, which is engaged in the assistance of underprivileged and disabled children (EBC Ex. 2, pp. 2-3; Tr. 985). Mr Ettlinger is also a member of the Horseman's Protective and Benevolent Association, California Chapter (Tr. 985), although he stated on the witness stand that his activities related to horse farming are mostly for his enjoyment (Tr. 985-86, EBC Ex. 2, p. 3). Mr Ettlinger is not involved in any civic activities in the Riverside area (EBC Ex. 2).

Sunland Communications Company

77. Sunland is a Pennsylvania partnership registered to engage in activities of all kinds in the telecommunications industry. The partners of Sunland are as follows (Sunland Ex. 1):

[15] Medallion purchases and sells programming throughout the world including to independents in the Los Angeles area. Medallion programming will also be sold to cable systems via satellites (Tr. 973-74). Medallion will initially provide 55% of the station's programming (Tr. 1006). The remainder will be obtained through barter arrangements (EBC Ex. 4, pp. 1-2; Tr. 1010).

[16] Jett is involved in the production and placement of radio and TV advertising campaigns (EBC Ex. 2, p. 2).

Name	*Partnership Interest*[17]
Jack M. Hodin	55%
Andres Luis Soto	35%[18]

The principals own no media interests (Sunland Ex. 5).

78. *Jack Hodin,* 55% partner of Sunland, will have the title of Managing Partner. Mr. Hodin will work full-time at the station at the outset (estimated to be the first six months to one year of station operations) and on a permanent basis for a minimum of twenty hours per week. Mr Hodin will direct the general administrative and financial aspects of the station. He will work closely and personally with Sunland's bankers and other sources of funds. He will have personal responsibility for the preparation of the station budget, and will oversee the station's accountants and other financial officers. In addition, Mr. Hodin will develop and maintain contacts with and participation in the community of Riverside and will be involved in the station's programming and sales of advertising in the community (Sunland Ex. 4, p.1: Tr. 1156-57).[19]

79. Mr. Hodin is a resident of Scranton, Pennsylvania, where he has lived throughout most of his life (Sunland Ex. 2, p. 1). Mr. Hodin intends to move his residence to the Riverside area should Sunland be granted its application (Sunland Ex. 4, p. 1), although possibly not in the city of Riverside (Tr. 1185). Mr Hodin served as a board member and officer of the license of non-commercial educational stations WVIA-FM/TV and, in

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[17] At the B cut-off date Sunland had a third partner, Mr. George Strimel, who had a 10% partnership interest. Mr. Strimel dropped out of the partnership subsequent to the B cut-off date and his interest was assumed by Jack Hodin. Mr. Hodin's actual partnership interest is thus 65%; however, for comparative purposes Mr. Hodin is being viewed as a 55% partner (Tr. 1168).

[18] Under the Sunland Partnership Agreement, Mr. Hodin is required to contribute his share of the capital and also contribute on a loan basis the capital contributions required from Mr. Soto until such time as Sunland receives the license for the Riverside station. If Sunland is unsuccessful, Mr. Soto is not obligated to either the partnership or Mr. Hodin for funds advanced or contributed by him. Assuming Sunland gets the grant, Mr. Soto is obligated to pay back any advances made on his behalf from future station profits. In addition, Mr. Soto is obligated under the Agreement to contribute to the construction and operation of the station in proportion to his 35% partnership interest (Family Ex. 9, pp. 2-3).

[19] Section 7 of the Partnership Agreement provides that the partners shall be entitled to vote on partnership business in accordance with their respective share of the partnership (Family Ex. 9, p. 4). Mr. Hodin's otherwise controlling partnership interest is limited so that a number of actions to be taken by the partnership can only be done with Mr. Soto's consent. Thus, for example, Mr. Hodin cannot sell, assign, mortgage, or grant a security interest in his Sunland partnership interest without the written consent of Mr. Soto (Family Ex. 9, p.5). In addition, all withdrawals from the partnership bank accounts must be signed by Mr. Soto as well as Mr. Hodin. Also, dissolution of the partnership and amendment or modification of the partnership agreement requires the consent of both partners (Family Ex. 9, pp. 5-6).

this role, he participated in the overall policies and affairs of the licensee, and, in particular, its financial affairs (Sunland Ex. 2, p. 2). More recently, Mr. Hodin served on the Executive Committee of the board and as Treasurer of the licensee (Sunland Ex. 2, p. 2).

80. *Andres Soto* will be General Manager of the proposed station. Mr. Soto will devote full-time to this position, working an average of at least forty hours per week at the station on a permanent basis. Mr. Soto's duties will be those typically associated with the general manager of a television station. He will directly supervise other management, technical, professional and sales employees. He will supervise all programming activities. He will be involved in the production of certain programs and the sale of advertising while he carries out day-to-day operational responsibilities at the station. Additionally, Mr. Soto will continue to maintain his civic activities in the Riverside area (Sunland Ex. 4 at 2).

81. Mr. Soto, who is Hispanic, was born in Mexicali, Mexico (Tr. 1272). He has lived in the Riverside area for the past 28 years and attended grade school and high school in Riverside. In 1975, he received an Associate of Arts degree from Riverside City College and he continued his studies at the University of California, Riverside, majoring in history and Chicano studies. He was active in student affairs at both colleges. From February 1980 to the present, Mr. Soto has been employed as the community relations specialist for the County of Riverside, Office of Community Development. He would terminate this employment if the Sunland application is granted (Sunland Ex. 3, p. 3).

82. Mr. Soto is a member and past chairman of the City of Riverside Parks and Recreation Commission, past president and current secretary of the Greater Riverside Hispanic Chamber of Commerce, and a member of the City of Riverside Local Planning Committee. He has served as chairman of the City of Riverside Community Development Advisory Committee. Mr. Soto is a member and past chairman of the Veterans Employment Committee of the Greater Riverside area, a member of American Legion Post #289, and a member, past chairman, vice chairman and secretary of the American GI Forum, Riverside Chapter. He has been a member of the Board of Directors of the Easter Seals Society and the American Red Cross. He belongs to the Riverside Brown Baggers and the Riverside Jaycees. Mr. Soto is currently vice president of the State of California Mexican-American Chamber of Commerce Board of Directors and chairman of the Arlanza-la Sierra Citizens Advisory Committee. He has also served as president of the Quinto Barrio Soft Ball League. He is a member of the Mexican American Political Association (MAPA), the California Republican Hispanic Council and the Riverside County Republican Party Central Committee. In 1980 he was the recipient of the Jaycees Distinguished Service Award (Sunland Ex. 3, p. 4). Mr. Soto intends to

continue to participate in civic activities if the Sunland application is granted and estimates that these activities would take five to six hours a week (Sunland Ex. 3, p. 5). Mr. Soto currently spends ten to eleven hours a week on community activities (Tr. 1265).

Bethel Broadcasting, Inc.

83. Bethel is a non-stock California Corporation. Its officers and Directors are Ronald B. Halvorson (Director, Chairman), Carl E. Vaughn (Director, President/Treasurer) and Ronald R. Heumann (Director, Vice President/Secretary) (Bethel Ex. 1).

84. Neither Bethel nor any of its officers or directors have any interest in any broadcast station or other medium of mass communications. BCC publishes bulletins and newsletters solely for its members and persons visiting or inquiring about it (Bethel Ex. 3).

85. Bethel's rulemaking and application activities have been financed primarily by Bethel Christian Center (BCC) with some additional contributions coming directly from the members of BCC's congregation (BCC's congregation totals approximately 400 voting members (Tr. 2046)). These individual contributions have been made through BCC to Bethel. These funds for Bethel remain in BCC's bank account and have been paid directly out of this account (Tr. 1360). There have been no documents executed between BCC and Bethel regarding BCC's payments of Bethel's expenses, although Bethel's President, Mr. Vaughn, testified that the money is being treated as a gift (Tr. 1424). As well as supplying funds to Bethel, BCC's office and building will be used for Bethel's studio (Tr. 2041).

86. Bethel's Board of Directors is self-perpetuating and the corporation's officers are elected by the Board. The Bylaws of Bethel provide that the pastor of BCC will be the Chairman of the Board of Bethel (Bethel Ex. 1). Mr. Halvorson, Bethel's Chairman of the Board, is BCC's current pastor (Tr. 2024). In addition, Mr. Vaughn is a member of BCC and is employed as the administrator of BCC. In that capacity he is responsible for the day-to-day administration of that institution (Bethel Ex. 9, p. 2; Tr. 1350-51).

87. If Bethel's application is granted, Mr. Vaughn will be the full-time General Manager of the proposed station (Tr. 1366). His duties at the proposed television station will encompass the general supervision of all station operations, including programming, personnel, community relations and finances. It is anticipated that Mr. Vaughn will have full and sole authority to make all day-to-day decisions affecting station operations and programming, subject only to the policy directives of Bethel's board of directors, of which he is a member (Bethel Ex. 5; Tr. 1368-9).

88. Mr. Vaughn moved to Riverside, California, in 1971. He currently resides in Sunnymead, California. In addition to his employment at BCC, Mr. Vaughn is an active member of the Church Business Administrators Advisory Council of California Baptist College, Riverside, California; the Riverside Area Board of Realtors; and the Riverside Chapter of the Full Gospel Businessmens Fellowship, International, of which he was Vice President in 1974-75 (Bethel Ex. 9, pp. 2, 3). Mr Vaughn intends to resign from his present position with BCC. He will maintain his present civic activities and will also continue as a real estate licensee in the Riverside area (Tr. 1376-68).

Channel 62, A Limited Partnership

89. Channel 62 is a California limited partnership composed of two general partners and eleven limited partners (Channel 62 Ex. 16). Under the terms of the limited partnership agreement (Channel 62 Ex. 16), the general partners have sole responsibility for the management and control of the partnership business. The limited partners are essentially passive investors in the project.

90. One general partner is Channel 62, Incorporated, a California business corporation the stock of which is owned 100% by the Greater Riverside Chambers of Commerce (Chambers), a non-profit corporation (Tr. 1905). Under the limited partnership agreement, Channel 62, Incorporated is obligated to contribute $100 towards the capital of the limited partnership. For this contribution, Channel 62, Incorporated is entitled to share in 1% of the profits of the limited partnership until such time as the eleven limited partners have been fully repaid their capital contributions; at that time Channel 62, Incorporated will be entitled to 25% of the profits of Channel 62. Channel 62, Incorporated is responsible for 1% of the losses of the limited partnership.

91. The overall policy of Channel 62, Incorporated is directed by its five-member board of directors, who are elected by the board of directors of the Chambers (Tr. 1890-91). The number of directors of the Chambers varies from time to time, but typically approximates forty-two (Tr. 1447, 1451). The present board of directors of Channel 62, Incorporated are (Channel 62 Ex. 4):

Principal	*Office*
Arthur Pick	Director/Secretary
Herman Reed	Director/President
Lucille Gilbreath	Director/First Vice President
Clare Taber	Director/Second Vice President
David Doig	Director/Treasurer

92. The second general partner, according to the limited partnership agreement, is Art Pick (Channel 62 Ex. 16), who is Executive Vice President of the Chambers (Channel 62 Ex. 1) and also a member of the board of directors of Channel 62, Incorporated (Channel 62 Ex. 4). According to the limited partnership agreement, Schedule "A", Mr. Pick's interest in the limited partnership is 0%, and he has made no capital contribution to the partnership. Mr. Pick will not share in the profits of the partnership; nor will he be responsible for its net losses.

93. The limited partners are responsible for 99% of the net losses of the limited partnership up to full amount of their capital contributions. They are entitled to 99% of the net profits of the partnership until their capital contributions have been repaid in full; thereafter they are entitled to 75% of the net profits of the partnership in proportion to their contributions (Channel 62 Ex. 16). The limited partners are as follows (Channel 62 Ex. 16, Schedule "A"):

Principal	*Contribution*	*Percentage Interest (Losses)*
John Gilbreath	$7,500	4.95%
Robert Hocker	$15,000	9.9%
Lucille Gilbreath	$15,000	9.9%
Russell Walling	$15,000	9.9%
Clare Taber	$15,000	9.9%
Ronald Pettis	$15,000	9.9%
Albert Kishaba	$7,500	4.95%
Norton Younglove	$15,000	9.9%
Jack Chase	$15,000	9.9%
Arthur Lopez	$15,000	9.9%
Betty Coy Johnson	$15,000	9.9%
		99.0%

94. Channel 62, the applicant, has no other interests in any medium of mass communications. Neither the general partners, Channel 62, Incorporated and Mr. Pick, nor any of the limited partners have any interests in other media. However, certain past and present directors of the Chambers do have media interests. Les Richter, Howard Fisher and Bart Singletary are owners, officers and directors of Inland Empire Broadcasters, licensee of radio station KPRO(AM), Riverside, California, and KWTC/KZNS (FM), Barstow, California. Mr. Tomas Rivera is a member of the board of directors of the Times Mirror Company, owner of newspapers and television stations. The television stations are WSTM, Syracuse, New York; KTVI, St. Louis, Missouri; KDFW, Dallas, Texas; KTBC, Austin,

Texas; WETM, Elmira, New York, WHTM, Harrisburg, Pennsylvania and WVTM, Birmingham, Alabama (Channel 62 Ex. 2).

95. According to Channel 62 Exhibit 2, none of the above directors of the Chambers will participate in any way or in any act on any matter involving the pending application for Channel 62, nor will they participate if a license is ultimately granted to Channel 62. However, there are no specific insulating procedures in the Chambers' bylaws (Tr. 1976). Furthermore, it appears that Mr. Richter, Mr. Fisher and Mr. Singletary were involved in activities resulting in the filing of the Channel 62 application (Tr. 1912-15). Mr. Fisher was an early promoter of the project (Tr. 1286-87) while he was serving as President of the Chambers (Tr. 1317) and as Chairman of the Chambers' executive committee (Tr. 1911). Mr. Fisher remains on the executive committee (Tr. 1918). Mr Richter was consistently involved in organizing Channel 62, Incorporated and served as a member of its board of directors and as a Second Vice President (Channel 62 Ex. 31, Ex. 12 at 2, Ex. 13, p. 4, Tr. 1883). Mr. Richter resigned from the Channel 62, Incorporated board on the day the Channel 62 application was signed (Tr. 1884). Mr. Singletary is now the President of the Greater Riverside Chambers of Commerce (Tr. 1922).

96. Channel 62's application stated that Mr. Pick would "devote at least 25% of his time as the General Manager of the proposed station." (Channel 62, Ex. 17). Mr. Pick stated that by this 25% figure, he intends to work in excess of 20 hours per week at the station.[20] (Tr. 1850-51). Presently, Mr. Pick works a maximum of 70 hours a week (Tr. 1848-51). When asked to explain the apparent discrepancy, Mr. Pick stated that he has the option of working more hours in the week, up to 100 (Tr. 1850-51).[21] Mr. Pick stated that it was always his intention to work at the station 20 to 25 hours per week (Tr. 1959). Nevertheless, Mr. Pick signed sworn answers to the Interrogatories of both EBC and Family, starting that he would devote approximately 10 hours per week in the operation of the station (Tr. 1962-64). Mr. Pick's only explanation for his signed and sworn answers to Interrogatories was, "I think it missed something in translation when we were communicating through secretaries and administrative assistants" (Tr. 1996).

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[20] Channel 62 also proposed Mrs. Johnson as an integrated principal. However, both because of her role as a limited partner and because of her testimony that she would not have a decision-making role at the station, the Presiding Judge struck her testimony to the extent it proposed integration (Tr. 1330).

[21] Mr. Pick's calculation of his time based on Channel 62's application is different from the way Channel 62's other proposed integrated principal, Mrs. Johnson, calculated her time based on the same Exhibit. Thus, Mrs. Johnson understood the portion of the application indicating that she would work at the proposed station "on a 75% basis" to mean 75% of her normal work week (Tr. 1308-09), four to six hours a week (Tr. 1297).

97. Mr. Pick moved to Riverside in 1955 (Channel 62 Ex. 1, p. 1). He has been involved in a variety of community activities in Riverside. His more recent activities have included his membership in the late 1960's and early 1970's on the Riverside City Council, his membership and later Chairmanship of the City of Riverside Cultural Heritage Board, his membership on the Advisory Board for the Riverside Junior League and the League of Women Voters and his Vice Presidency of "The Friends of the Mission Inn." In 1981, Mr. Pick was elected a member of the Board of Directors of the Riverside United Way and is a member of the Board of the U.C.R. Alumni Association, positions which he still holds. Finally, Mr. Pick was a founder and a member of the Board of Directors and a member of the Executive Committee and Treasurer of Citizens Goals for the Greater Riverside area and was founding member of the Executive Committee and Treasurer of the Mocking Bird Park Advisory Committee (Channel 62. 1, pp. 4-6).

Riverside Family Television, Inc.

98. Family is a Tennessee Corporation which was organized in 1981. Family has three principals: Cheryal A. Kearney is its President, a Director and, as of the B cut-off date in this proceeding, 80% stockholder;[22] Jack Dalton is its Vice President/Treasurer, a Director and, as of the B cut-off date 20% stockholder; and Erma L. Freeman is its Secretary, having no stock interest in Family (Family Ex. 1, p. 1).[23]

99. The principals of Riverside Family have no interests in any broadcast station or in any other media or mass communications entity[24] (Family Ex. 1, p. 2). Mr. Dalton had a very brief interest in a construction permit for KSPR(TV), Channel 33, Springfield, Missouri (BPCT-800714KJ). After the Riverside Family application was filed and following the B cut-off date, Mr. Dalton became a 33% limited partner in Springfield Television Associates, Ltd., the proposed assignee of the construction permit of KSPR(TV), Channel 33, Springfield, Missouri, from Springfield Family Television, Inc. (BAPCT-820414FR). Mr. Dalton agreed to sell his interest to another limited partner sometime in late June or early July 1982 (Tr. 2075, 2132). The actual sale was delayed, however, in order to give the purchaser time to assemble his funds and for the papers to be

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[22] Subsequently, Ms. Kearney and Mr. Dalton shifted their stock interests to 95% for Ms. Kearney and 5% for Mr. Dalton (Family Ex. 1, p. 1).

[23] Ms. Freeman was Dalton's personal secretary in Nashville, Tennessee and had acted as corporate secretary in other broadcast applications involving Dalton (Tr. 2103). Mr. Dalton owns a construction company and other businesses in Nashville, Tennessee (Tr. 2173-74).

[24] Principals of Family are also involved in pending broadcast applications, but such applications have no comparative significance. *Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (1968).

drawn up and signed (Tr. 2075). Prior to the consummation of the sale, on August 4, 1982, the Commission, under delegated authority, granted its consent to the assignment to Springfield Television Associates, Ltd. Mr. Dalton subsequently sold his interests in Springfield Television Associates, Ltd., pursuant to the aforementioned agreement for an amount equal to his contribution to the partnership to the other limited partner on August 17, 1982 (Family Ex. 1, p. 2).[24a] Springfield, Missouri is approximately 1,450 miles from Riverside, California. It has four other television stations as well as a construction permit outstanding. There are eleven other radio stations in the market (Family Ex. 7).

100. Ms. Freeman was the Secretary, Director and the holder of 20 shares (2%) of High Country Broadcasting, Inc., holder of a construction permit for a new television station, Channel 27, at Reno, Nevada (BPCT-810302KF) at the time the application was filed. She has since resigned her offices and sold her interests in the station (Family Ex. 7). Reno, Nevada is approximately 400 miles from Riverside, California. It has four other television stations as well as a construction permit outstanding (Family Ex. 7).

101. Ms. Kearney, a Black female, is proposed as the full-time General Manager of the station. As General Manager, she will supervise the construction and operation of the station. She will be responsible for making decisions regarding employment, programming and the station's operating budget (Family Ex. 2, p. 1).

102. Ms. Kearney is a life-long resident of Los Angeles, where she currently resides (Family Ex. 2, p. 1, 4). Her present residence is approximately one hour and 15 minutes commuting distance from downtown Riverside (Tr. 2362). Ms. Kearney has not at this time made a decision to commit herself to moving closer to Riverside (Family Ex. 2, p. 4; Tr. 2407). Ms. Kearney has a BA degree in interior design from Woodbury College in Los Angeles. She has also taken graduate courses at the Musee Des Arts Decoratifs in Paris in association with the Parsons School of Design in New York City (Family Ex. 2, p. 1). For the last 13 years, she has been a freelance set decorator in the movie and television film industry. She is responsible for putting together the set design for filming. In this role, she works for production designers and art directors in the production of movie and television films. Ms. Kearney's duties include the hiring, firing, and supervision of the crew which constructs the sets used for filming (Family Ex. 2, p. 2).

103. Ms. Kearney has been a member of the NAACP for approximately 15 years. She is now a member of the Los Angeles branch, having

[24a] The Commission's grant of the assignment application and Mr. Dalton's subsequent divestiture were reported in a single timely filed amendment (Official notice taken, Family amendment, filed August 27, 1982).

switched her membership from the Beverly Hills/Hollywood branch. From time to time she participates in fundraising and voter registration functions, and, in addition, has served on the executive board of the Hollywood/Beverly Hills branch. Ms. Kearney has been a member of the Urban League in Los Angeles for approximately three years. She has been a member of the Brockman Gallery in Los Angeles for approximately 13 or 14 years. As a member, she attends art fairs and art shows. She has also been a member since June 1982 of the California Museum of Afro-American History and Culture in Los Angeles. She attends gallery openings and shows. Finally, Ms. Kearney has attended and in early 1982 became a member of the Cornerstone Institutional Baptist Church in Los Angeles (Family Ex. 2, p. 3).

104. During the course of the hearing, certain questions were raised concerning the true and actual ownership of Family. These questions arose from the fact that Mr. Dalton, a 5% shareholder, had advanced all the funds for the venture (Tr. 2078-80), while Ms. Kearney, the 95% shareholder, had not paid for her stock or made any other financial contribution to the applicant (Tr. 2364). The following facts were elicited: Mr. Dalton has known Ms. Kearney only about 3 years. He came to know Ms. Kearney after Mr. Dalton's wife studied for a time with Ms. Kearney in Paris (Tr. 2099). Subsequent to that time, Ms. Kearney and Mr. Dalton's wife contacted each other from time to time, and Ms. Kearney visited the Daltons in Tennessee for one week during 1980 (Tr. 2163). During that visit Ms. Kearney told Mr. Dalton that she would like to get involved in some sort of business and the two discussed that possibility but did not get into specifies. The Riverside television project was not discussed (Tr. 2163-64). Subsequent to that visit in 1980, Mr. Dalton had no face-to-face meeting with Ms. Kearney until the hearing in this proceeding (Tr. 2164, 2167). Mr. Dalton has had no other business relationship with Ms. Kearney (Tr. 2100). Mr. Dalton has not seen her financial statements (Tr. 2100).

105. Mr. Dalton stated that the purpose of the stock structure, in which he received only 5% of the stock but was advancing all of the money, was to maximize Family's chance of winning at a comparative hearing (Tr. 2255-56, 2269, 2272). Mr. Dalton stated that the "sole reason" why he was willing to take only 5% was so that Family would gain under the integration criterion (Tr. 2274). Although Mr. Dalton was aware that Ms. Kearney's income was $60,000 a year (Tr. 2267-68), he "thought it would be fair" for Ms. Kearney to receive 95% of the stock of the company without paying for the stock or otherwise contributing to the expenses of the application (Tr. 2268-69). Mr. Dalton stated that he and Ms. Kearney have no agreement or understanding of any kind nor have they ever had

any discussions regarding his purchase of Ms. Kearney's stock (Tr. 2269-70, 2273-74, 2275, 2374, 2409).

106. With respect to the issuance of stock, $1,000 has been paid in for the 1,000 shares of issued stock (Tr. 2078). Mr. Dalton paid the entire $1,000, and expects no repayment for those shares by Ms. Kearney (Tr. 2134). Ms. Kearney's contribution to the company or the application process has only been her time spent on application matters (Tr. 2136) and certain out-of-pocket expenses incurred by her for this purpose (Tr. 2134-35). One day prior to the hearing, on September 13, 1982, Mr. Dalton prepared stock certificates for his 50 shares and Ms. Kearney's 950 shares under his own signature (Riverside Family Ex. 15; Tr. 2206-07). However, these shares were not sent to Ms. Kearney prior to the hearing (Tr. 2171, 2401); they remained in the stockbook at Mr. Dalton's office in Tennessee (Tr. 2166, 2171).

107. Mr. Dalton was the promoter of Family's participation in this proceeding. He was the one who became aware of the possibility of applying for a new station at Riverside and contacted Ms. Kearney by telephone[25] with respect to submitting an application (Tr. 2163). Mr. Dalton was familiar with Sterling Communications, the consulting company which put the application together, because he had utilized their services in his applications for Daytona Beach, Florida and Richardson, Texas television stations[26] (Tr. 2181). He recommended its use in the Riverside proceeding (Tr. 2156), and he personally executed their contract (Tr. 2209-10). During the course of the proceeding, Mr. Dalton would often contact Ms. Kearney to relay information rather than having Family's attorneys contact Ms. Kearney directly (Tr. 2204-05). Mr. Dalton claimed that this was required because of Ms. Kearney's schedule and the time differences between Los Angeles and Washington, D.C., making it difficult for Family's attorneys to contact her during the day (Tr. 2204-05).

108. Ms. Kearney's activities in pursuit of the application included setting up the public file (Tr. 2136), taking pictures of the tower site (Tr. 2136), putting public notice of the filing of the application in local newspapers (Tr. 2361), calling Riverside with respect to EEO data (Tr. 2361) and providing information to Sterling Communications to enable it to complete the Family application (Tr. 2387-2401). Ms. Kearney had nothing to do with securing the Amvest equipment lease letter (Kist Ex. 11) although that letter was sent to her (Tr. 2360). Mr. Dalton testified that Ms. Freeman did the Riverside ascertainment work "more or less" at the direction of Ms. Kearney (Tr. 2116, 2218-19). However, it is clear that apart from meeting with Ms. Freeman and discussing the results of Ms.

[25] Ms. Kearney lives in Los Angeles, California and Mr. Dalton lives in Nashville, Tennessee (Tr. 2164).

[26] The Richardson application has been dismissed (Family Ex. 1, pp. 3-4).

Freeman's work to some degree, Ms. Kearney had nothing to do with the ascertainment process (Tr. 2363, 2382-83). Ms. Freeman was paid her regular salary as secretary to Mr. Dalton during the period she was doing the ascertainment work for Family in Riverside (Tr. 2220).

109. Mr. Dalton has provided all the funds for Family. At the time of the hearing Mr. Dalton had invested $65,000 to $70,000 of his funds in the application process (Tr. 2079), and had paid $1,000 for the shares of stock—including the 95% belonging to Ms. Kearney (Tr. 2078, 2134). There was no written agreement for the company to repay these advances should it be successful (Tr. 2093-94, 2079-80), but Mr. Dalton believed that there was an oral agreement to that effect (Tr. 2089-90). Ms. Kearney testified that they never discussed reimbursement of Mr. Dalton's advances (Tr. 2407). There was an explicit agreement that Ms. Kearney would not be required to pay for her stock, make loans or make other advances to Family (Tr. 2094, 2364). The advances by Mr. Dalton were believed by him to be in the nature of an interest free loan (Tr. 2090). Should Family be successful, Mr. Dalton believed that the loan would begin to accrue interest at prime plus 1% after operations at the station began with a seven year repayment from the corporation (Tr. 2091-92).

110. Mr. Dalton arranged the financing of the construction and first-three-months operation through a loan of $500,000 to Family from a Tennessee bank in which he keeps substantial deposits (Tr. 2079-83, 2085, 2177). The Commerce Union Bank of Nashville is the same bank used by the applicants for stations in Daytona Beach, Florida and Salt Lake City, Utah with which Mr. Dalton is involved (Tr. 2145-46). The terms of the loan letter require the pledge of stock and personal guarantees of both Mr. Dalton and Ms. Kearney (Tr. 2085). Pledges of stock and personal guarantees have been submitted to the bank by both Mr. Dalton and Ms. Kearney (Tr. 2139, 2276). However, Mr. Dalton stated that he never gave the bank Ms. Kearney's financial statement (Tr. 2087) and that the bank was not interested in Ms. Kearney's financial situation (Tr. 2143). In addition, Mr. Dalton had agreed to provide a personal loan of up to $500,000 to Family as a buffer in case the bank loan proves to be inadequate to cover Family's costs (Tr. 2177). Mr. Dalton's loan would be made at the same interest and with the same repayment schedule as offered by the bank (Kist Exs. 8, 9).

111. Mr. Dalton set up Family's bank account. Family has its checking account at the Commerce Union Bank (Tr. 2078-2102). At the time the account was opened, Mr. Dalton was a signatory to the account (Tr. 2121), and he has written most of Family's checks and paid most of the bills (Tr. 2123, 2128). Ms. Kearney was not made a signatory on the account until much later (Tr. 2102), and has never written a check on the account (Tr. 2102). Mr. Dalton keeps the checkbook with him in Nashville and receives

statements from the bank (Tr. 2185). The company's accountant is also in Nashville (Tr. 2078). When the account was first opened, Doctor Crants, who shares an office with Mr. Dalton and is involved with him in his television applications for Richardson and Daytona Beach (Tr. 2126), was made a signatory on the Family bank account (Tr. 2102). Mr. Crants has written checks on the account (Tr. 2120) as a "matter of convenience" (Tr. 2121). Mr. Dalton never discussed with Ms. Kearney the fact that Mr. Crants was made a signatory to the account (Tr. 2125, 2183). Mr. Crants was deleted as a signatory on the account when Ms. Kearney was added at a latter time (Tr. 2102).

112. The shareholders and directors of Family have repeatedly ignored the company's corporate form and violated its governing documents. At the time of the hearing, there had never been an annual meeting of shareholders although the company had been in existence well over a year (Tr. 2212). There had never been an organizational meeting of directors (Tr. 2112). At the time of the hearing, the company only had two directors—Mr. Dalton and Ms. Kearney—although its bylaws (EBC Ex. 5) require three directors (Tr. 2104). At the time of the hearing, the directors had had no formal meetings and no minutes existed concerning possible informal meetings held by telephone by Mr. Dalton and Ms. Kearney (Tr. 2117, 2211). No board of directors action ever established the bank account, an action required by the bylaws (Tr. 22210). No board action was ever taken making Doctor Crants signatory to the bank account (Tr. 2183). The bylaws state that the President should issue stock in the company, but Mr. Dalton, the Treasurer and Vice President, was the one who issued the stock on September 13, 1982 (Tr. 2208). Mr. Dalton and Ms. Kearney ignored the bylaws provision prohibiting the issuance of stock for future services of Ms. Kearney (Tr. 2137-38). Neither Mr. Dalton nor Ms. Kearney was familiar with the bylaws (Tr. 2429). Mr. Dalton admitted that he had not paid to much attention to corporate formalities (Tr. 2257).

United American Telecasters, Inc.

113. United is a California Corporation. A total of 1,000 shares of common voting stock have been authorized and subscribed to, but none have been issued at this time. The record reflects the following subscribers to United stock, their proposed percentage of stock ownership and their corporate office (United Ex. 2):

Principal	*Percentage*	*Office*
Andrew Y. Kimm[27]	20%	President/Director
Rachel Kimm[27]	15%	Secretary/Director

[27] Andrew and Rachel Kimm are husband and wife (United Ex. 2).

Nicholas C. Chun	20%	Vice President/Director
Goon Suk Han[28]	25%	Director
Sam A. Digati	15%	Director
Bong Koo Kim	5%	--

114. No proposed stockholder of United has any ownership interest in any broadcast station, in any broadcast-related enterprise, or in any medium of mass communications (United Exs. 3-8).

115. Five proposed stockholders of United will be employed at the station as follows: Andrew Kimm as General Manager; Rachel Kimm as Personnel Manager; Nicholas Chun as Sales Manager; Sam Digati as Public Relations and Public Service Director; and Bong Koo Kim as Program Director. Mr. and Mrs. Kimm, Nicholas Chun and Bong Koo Kim are of Korean heritage (United Ex. 2).

116. *Andrew Kimm* is proposed to be the General Manager of the Riverside television station. His duties will include providing direct supervision to the department heads, working with attorneys and consultant engineers, and other duties which should be carried out in the capacity of a general manager (Tr. 2614-15).

117. Mr. Kimm resides in Manhattan Beach, California, which is located about 50 miles from Riverside (United Ex. 3, p. 1; Tr. 2699). Although he has lived in the Los Angeles area since 1966, Mr. Kimm has never lived in Riverside (United Ex. 3, p. 1; Tr. 2699). Should United be awarded the construction permit, he will move his residence to Riverside and work full-time at the station (United Ex. 3, p. 1).

118. Since April 1977, Mr. Kimm has owned and operated Traders International, an import-export company in Manhattan Beach (United Ex. 3, p. 1). If the United application is granted, Mr. Kimm will hire a manager to run this business (United Ex. 3, p. 1; Tr. 2623-24). From 1967 to 1977 Mr. Kimm was the publisher and owner of the Korean American Herald, a bilingual (Korean and English) newspaper published weekly in the Los Angeles area (United Ex. 3, p. 1, 2). Mr. Kimm has no broadcast experience (Tr. 2617). Mr. Kimm is a member of the Los Angeles Reformed Church and has been a deacon of that Church since 1979 (United Ex. 3, p. 2). Mr. Kimm does not presently participate in any civic activities in Manhattan Beach, Los Angeles or Riverside (Tr. 2700).

119. Mrs. Kimm will work 40 hours a week at the station in her job as Personnel Manager (United Ex. 4, p. 1). She will evaluate and maintain the personnel files (Tr. 2633), develop employee functions and duties (Tr. 2633, 2822), recruit and interview all job applicants (Tr. 2632, 2822, 2859, 2861-2862), and assign them to their positions (TR. 2988), arrange for the training of new employees (Tr. 2822), cooperate with department heads in

[28] Mr. Han was added as a principal after the "B" cut-off date and has been disregarded for the purposes of the comparative issue herein (Tr. 2447).

evaluating employee performance (Tr. 2633, 2992-3), and make recommendations to the General Manager regarding the termination of employees (Tr. 2637, 2992).

120. Mrs. Kimm is a graduate of Seoul National University, Seoul, Korea (Tr. 3092-3093). Her native language is Korean, but she is also fluent in Japanese, and can speak Chinese on a conversational level (Tr. 2632, 3049) Her knowledge of the English language is somewhat limited.[29] Currently, in the operation of her boutique, she uses English every day, in conversations with her customers most of whom are English speaking persons, and in the management and operation of the store (Tr. 2876, 3098-3099, 3108). She also speaks English with her children and with her neighbors (Tr. 3108). She is currently enrolled in English language courses at the South Bay Adult School in Manhattan Beach, California. She is attending classes for three hours per day, five days a week, and believes that she will be fluent in English by the time this proceeding is concluded (Tr. 2852, 2993-2996). If she finds that she needs assistance in the performance of her duties as Personnel Director, she will hire a part-time interpreter or use assistants who will be bi-lingual or use her husband as an interpreter (Tr. 2632, 2994-2995, 3049-3050). At present, she would need some assistance in interviewing English-speaking job applicants (Tr. 3050). Mrs. Kimm stated that the personnel records at the station will be maintained in English and that while she may need some assistance in maintaining reports, she can read English much better than she can speak it (Tr. 3050-3051).

121. Mrs. Kimm now lives in Manhattan Beach with her husband, and has lived in the Los Angeles area since 1966 (United Ex. 4, p. 1; Tr. 2981). She will move to Riverside and work full-time at the station if the United application is granted (United Ex. 4, p. 1). Mrs. Kimm currently owns and operates a ladies' boutique in Lawndale, California, which is near Manhattan Beach. If the United application is granted, she intends to sell the boutique (United Ex. 4, p. 1; Tr. 2981). From 1967 until 1977, Mrs. Kimm was employed as Personnel Manager of the Korean-American Herald, the weekly bilingual newspaper published by her husband (United Ex. 4, p. 2). The record reflects that her past work as Personnel Director was with Korean-speaking employees (Tr. 2630).

122. Since 1977 Mrs. Kimm has been a member and a deacon of the Los Angeles Reformed Church, where she is active in the Women's Society (United Ex. 4, p. 2). Also, at various times during the past five years Mrs. Kimm has been employed on a part-time basis as a counselor for the Asian-American Women's League in Los Angeles. She intends to continue to make herself available to the League as a counselor to the

[29] The cross examination of Mrs. Kimm was conducted largely through the aid of an interpreter.

extent such activities will not interfere with her work at the station (United Ex. 4, p. 1).

123. *Nicholas Chun* is proposed to be Sales Manager at the station (United Ex. 5, p. 1). His duties will include actual selling of time (Tr. 2640, 2923) and supervising the sales staff (Tr. 2641). He will have no responsibilities for hiring and firing (Tr. 2895). He estimates he will be selling outside the station about half of his time (Tr. 2923-24).

124. Mr. Chun has lived in Los Angeles since 1974 (United Ex. 5, p. 1). He estimates that his residence is between 60 and 80 miles from Riverside (Tr. 2913), and he hopes to keep his residence in Los Angeles, although he stated that he is willing to move to Riverside if necessary (Tr. 2912, United Ex. 5, p. 1). He intends to work full-time at the station (United Ex. 5, p. 1).

125. From 1976 to 1980, Mr. Chun was a real estate salesman in Los Angeles. From April 1980 to April 1982 he was the sole proprietor of English Shoes and Chun's, Inc., a retail shoe store in Los Angeles. He currently manages a gasoline station in Culver City, California and also works as a real estate broker on a part-time basis (United Ex. 5, p. 1). If the United application is granted, Mr. Chun proposes to give up his service station job, but he expects to continue to work ten hours a week in the real estate business (Tr. 2898). Since 1974 Mr. Chun has been a member of the Korean Community Association in Los Angeles. Between 1977 and 1979 he served on the board of directors of that organization. He has been a member of the Korean Pharmacist's Association of Southern California since 1974 and has served on its board of directors since 1976 and as its President between 1978 and 1980. Mr. Chun has been an elder of the Young Nak Presbyterian church in Los Angeles since 1977 (United Ex. 5, p. 2).

126. *Sam A. Digati* will work at the station at least 40 hours a week (United Ex. 6, p. 1). As Public Relations and Public Service Director, Digati will contact community leaders and organizations in order to ascertain what the station should be doing for the community and also to make sure that the community is aware of the station (Tr. 2704). Digati will also contact organizations in order to make available to them the opportunity to broadcast public service announcements, and will have a role in preparing public service announcements to be aired over the station (Tr. 2807-2810). Dr. Digati will not have a supervisory role over other personnel at the station (Tr. 2694). In addition, Mr. Kimm and the program director will make the decisions about programming (Tr. 2704-05).

127. Mr. Digati has lived in Riverside for 28 years (United Ex. 6, p. 1). He proposes to work full-time at the station should the United application be granted (United Ex. 6, p. 1). Mr. Digati is at the present time the Treasurer and a director of Parkview Community Hospital, a position

which he intends to continue (Tr. 2558-59). His duties with that organization take three to three and one half hours per month (Tr. 2559). Also, Mr. Digati is a member of the Riverside City Council, which takes between 10 and 30 hours per week on a regular basis (Tr. 2560). He has no intention to resign at the present time from the City Council (Tr. 2562), and fully intends to finish his present term which lasts for three more years (Tr. 2564). Furthermore, Mr. Digati admitted on the witness stand that he had given thought to and discussed with other members of the community the idea of running for Mayor when his present City Council term expires. The job for Mayor in Riverside is a full-time salaried position. When questioned about his intentions, Mr. Digati refused to rule out the possibility that he would run, even if the United application were granted (Tr. 2565-67). Mr. Digati presently works as manager and secretary of the B. P. O. Elks Lodge in Riverside and will resign that employment if the United application is granted (United Ex. 6, p. 1).

128. Mr. Digati has served on the Riverside City Council for a total of 10 years, and his duties have included serving as Chairman of the City's Economic Development Committee, President of the Economic Development Corporation of Riverside, Chairman of the City Legislation Committee, and Chairman of the Planning Commission. He was the Riverside City Delegate to the Association of Governments. He has been a member of the Arlington Kiwanis Club and served on its board of directors. He has been a member of the Advisory Committee of the Riverside Police Explorer Post. He is a life member of the Riverside County Association for Retarded Children and has served as its director. Mr. Digati is a Regional Director for "We Turn In Pushers" ("WE TIP"), an anti-crime organization. In 1976 he was honored as the statewide man of the year by that organization. He has received the Citizen of the Year Award from the Boy Scouts of America, Inland Empire Council. He is a member of the Veterans of Foreign Wars, the American Legion, Elks, Knights of Columbus, and Loyal Order of Moose. He is a charter member of the Friends of Loma Linda University, La Sierra campus. He has served as a member of the Riverside Boy's Club and was President of the Queen of Angels PTA. He has also been a member of the Riverside Chamber of Commerce and has served on its board of directors. He has been a member of the local Hispanic Chamber of Commerce and he also belongs to the La Sierra and Arlington Chambers of Commerce. He has been President of each of these two district Chambers. He has received the volunteer of the Year Award from Riverside Chambers of Commerce (United Ex. 6, pp. 2-3).

129. *Bong Koo Kim* is proposed to be Program Director at the station (United Ex. 7, p. 1). His duties will include responsibility for all programming except commercials (Tr. 2645), supervising program produc-

tion employees (Tr. 2645-46, 2950), and assisting the procurement of programming (Tr. 2650, 2940).

130. Mr. Kim resides in Temple City, California, and has lived in the Los Angeles area since 1967 (United Ex. 7, p. 1). He is currently unemployed and will move to Riverside and work full-time at the station if the application of United is granted (United Ex. 7, p. 1).

131. Mr. Kim has been involved in the field of broadcasting for more than 25 years. He was among the first on-air performers on television in Korea, serving in that role as early as 1956. From 1968 to 1972, he worked for the Korea Broadcasting Service, a Los Angeles company which purchased time on KBBI(FM) (now KLVE), Los Angeles, for Korean language programming. His duties included program editing and newscasting (United Ex. 7, p. 1). From 1972 to 1976, he was a newscaster for Korean TV Productions, a television production company. In 1976 to 1978, Kim was General Manager of the Korean Broadcasting Company (KBC). During that period, KBC provided the programming service on the sub-carrier channel of KMAX(FM), Arcadia, California, and Kim was involved in a broad range of broadcast-related areas, including the production and scheduling of programs, newscasting, and management of personnel (United Ex. 7, pp. 1-2; Tr. 2947), KBC broadcast over an FM sub-carrier and leased special receivers to its listeners (Tr. 2946). This was a 24-hour operation and included music, news, English language lectures, legal programs, and drama (Tr. 2947-2948). From 1978 to 1981, Kim was General Manager of the World Wide Broadcasting Network, a Los Angeles company which produced television programming and purchased time on television station KSCI, San Bernardino, and KWHY-TV, Los Angeles, for the broadcast of these programs (United Ex. 7, p. 2). As General Manager of World Wide, Kim personally supervised the programming and production staff, cameramen and newswriters (Tr. 2965-2966). He assumed overall responsibility until the broadcast was complete (Tr. 2966). He also did some newscasting (Tr. 2947), wrote copy for the newscasts (Tr. 2955), and edited tapes (Tr. 2947).

132. Mr. Kim has been a member of the Los Angeles Central Lions Club since 1980, and has served as First Vice President. In 1977 he received a certificate of merit from the Los Angeles Human Relations Commission. In 1973 and 1977 he was given an award by the Korean Association of Southern California in recognition of his contributions to the development of the Korean community in California (United Ex. 7, p. 2).

Conclusions

Issue 2 - Bethel Financial Qualifications

133. Bethel's cost of constructing and operating its proposed station through the first three months on the air will be $1,408,550. Bethel has available $1,519,656 consisting of existing capital ($10,000), deferred equipment credit ($759,656), and a bank loan commitment ($750,000). Thus, Bethel is financially qualified. Issue 2 is resolved favorably to Bethel.

Issue 3(a) to (c) - Channel 62 Legal Qualifications

134. A legal qualifications issue was specified against Channel 62 on the basis of missing information in Section II of its application. Missing was the Table I and Table II information for the officers, directors and shareholders of Channel 62, Incorporated and the Chambers which holds 100% of the stock of Channel 62, Incorporated. Also missing was the information required by questions 17(1) through 17(4) of Section II relating to the other media interests of such officers, directors and stockholders of Channel 62, Incorporated and the Chambers. Channel 62 has supplied the missing information. The issue will be resolved in favor of Channel 62.[30]

Issue 3(d) to (f) - Channel 62 Financial Qualifications

135. Channel 62 will require $1,285,643 to construct and operate the proposed station for three months. Channel 62 proposes to rely on $150,000 from its limited partners and a bank loan in the amount of $2,000,000 from the Riverside National Bank. Channel 62 has shown the availability of $150,000 from its limited partners. However, the proposed bank loan cannot be credited. Neither the original bank letter or the two follow-up letters provide reasonable assurance of the availability of the loan. Riverside bank's letter stated that it would "consider participating in a loan of $2,000,000" provided several conditions were met (Letter dated

[30] The findings establish that two of the Chamber's board members, Howard Fisher and Bart Singletary, are stockholders in a corporation which is the licensee of an AM station in Riverside, California. In addition, another Chambers board member, Tomas Rivera, is a director of the Times Mirror Co., which holds interests in seven television stations. It is urged that Channel 62 is in violation of Section 73.636(a)(1) and (a)(2) and should be disqualified. The argument is rejected. The parties did not request a Section 73.636 issue and it is too late to advance such a proposition. *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016 (Review Board 1980) is inapposite since a Section 73.636 issue was specified in that case. In this connection, with respect to Mr. Fisher's and Mr. Singletary's interest, the parties have not demonstrated that the UHF exception specified in Note 8 to Rule 73.636 is not applicable. With respect to Mr. Rivera's holding, any grant to Channel 62 will be conditioned on his withdrawal as director of the Times Mirror Co. or of the Chambers.

January 29, 1982). The bank never stated that it would make a loan under certain conditions, only that it would consider doing so. A present firm intention to make a loan, future conditions permitting, is the essence of the "reasonable assurance" standard. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980). The bank letter obtained by Channel 62 does not express a present, firm intention to make a loan and, therefore, does not satisfy the "reasonable assurance" standard. See *Boyd, Crosby N.*, 57 FCC 2d 474, 489 (1976); see also *Town & Country Radio, Inc.*, 53 FCC 2d 401, 403 (Rev. Bd. 1975). *Multi-State Communications, Inc.* v. *FCC*, 590 FCC 2d 1117, 1119 (D.C. Cir. 1978) does not require a different result. Unlike the letter here the bank's statement there that it was "willing to lend" the requested funds indicated a present firm intention to make the loan. In addition, the Riverside bank's lending limit is $600,000 and any loan is limited to that amount unless the bank can obtain "additional participants willing to accept the proposed terms" (Letter dated January 29, 1982). The Riverside bank has not identified its participating banks. More important, neither Channel 62 or the Riverside bank have submitted letters from other banks confirming their willingness to share in the loan. In the absence of evidence demonstrating that other banks would be willing to participate in the loan with the Riverside bank, there is no reasonable basis for concluding that the Riverside bank will be able to make the full loan to Channel 62. See *CBS, Inc.*, 49 FCC 2d 1214, 1228-29 (Rev. Bd. 1974); *Lamar Life Broadcasting Co.*, 26 FCC 2d 112, 115 (Rev. Bd. 1970); *TVUE Associates, Inc.*, 5 FCC 2d 419 (Rev. Bd. 1966); see also *Wadeco, Inc.*, 628 F.2d 122, 124 (D.C. Cir. 1980). Since Channel 62 has shown the availability of only $150,000, far short of the necessary $1,285,643, it is financially disqualified.

Issue 4 - United Financial Qualifications

136. United will require $2,182,550 to construct and operate the proposed station for three months. United proposes to rely upon deferred equipment credit of $877,500 (not contested) and a $2,000,000 loan from the West Olympia bank. As was the case with Channel 62, the bank letter cannot be credited. The proposed loan is well beyond the legal lending limit of the West Olympia Bank. The bank's credit limits are approximately $150,000 to $160,000 for unsecured loans and $300,000 for secured loans. Thus, in order to make the loan, the bank would have to syndicate it among several other banks. No other banks, however, have even been contacted by the West Olympia Bank for this purpose. In the absence of any showing whatsoever that other banks would be willing to participate in the loan with the West Olympia Bank, there is no reasonable basis for concluding that the West Olympia Bank will be able to make the full loan in question to United. See *CBS, Inc., supra*; *Lamar Life, supra*; *TVUE*

Associates, supra; Wadeco, supra. This is particularly clear here, where there is no evidence that the bank has ever managed a participatory loan of any kind let alone one of this magnitude[31] and where there can be little or no first-lien security against the station's assets because United's equipment supplier would have a first lien on its equipment. Under these circumstances, the West Olympia bank's expression of confidence in its ability to syndicate a loan to United is not sufficient.

137. United argues that it need not show that other banks are willing to participate in the loan. According to United, all that is required of an applicant to establish reasonable assurance of the availability of the loan is evidence that the bank is aware that the loan will require participation of other banks and that this is standard banking practice. Contrary to United's contention, *Lamar Life, TVUE Associates* and *Wadeco* make clear that evidence of the willingness of other banks to participate in the loan is also necessary. Further, there is no basis for United's assertion that a financial issue was added in *CBS, Inc.* solely on the basis of the bank's failure to acknowledge that the loan would require participation of other banks. The Board's specific reference to the showings made in *Lamar Life* and *TVUE Associates* indicates that its holding is not so limited. In addition, *Cherokee Broadcasting Co.*, 8 FCC 2d 138 (Rev. Bd. 1967) and *Adirondack Television Corp.*, 5 FCC 2d 623 (Rev. Bd. 1966), cited by United, which preceded *CBS, Inc.*, are factually dissimilar from the instant case and do not support its position. Adirondack involved a $500,000 loan; the bank's lending limit was $260,000. In denying the addition of an issue in Adirondack, the Board did not reach the question of the adequacy of the applicant's showing. The Board based its denial on procedural deficiencies and on the ground that the loan commitment had been previously considered by the Commission prior to designation, citing *Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965). In this connection unlike *Adirondack*, a financial qualifications issue was specified here in the Designation Order. Cherokee involved a $14,000 loan; the bank's lending limit for unsecured loans was $10,000.[32] In response to the request for an issue, the bank revised its letter, stating that to avoid exceeding the legal loan limit other banks would participate or the note would be assigned. Also, the bank letter stated that the bank's board of directors had approved the procedure for handling the proposed loan to Cherokee. The Board denied the request for an addition of an issue on the basis of these specific facts, which bear no resemblance to the facts here, and also

[31] On an unsecured basis, the West Olympia Bank could not supply even one-tenth of the funds needed by United and even on a secured basis, the bank could provide less than one-sixth of the amount required.

[32] Petitioner contended the depreciated value of Cherokee's AM equipment was only $9,165,500, insufficient to constitute security for the bank loan.

because, like *Adirondack*, the Commission had previously considered the loan commitment. Since, the $2,000,000 bank loan can not be credited, the funds available to United fall far short of the amount required ($2,182,550). Accordingly, it is concluded that United is not financially qualified.[33]

Issue 5 - Sunland, Bethel Air Hazard

138. The FAA has issued determinations of "no hazard" with respect to Sunland's and Bethel's proposed tower. Issue 5 is resolved in favor of both applicants.

Issue 6 - Bethel Violation of Section 73.3514

139. The omissions from Bethel's application resulted from two factors. The first, and most egregious, was the abandonment of Bethel by its original communications counsel. This abandonment was exacerbated by the facts that it was done without notice to Bethel and that it took place at a time which, not known to Bethel, was critical to the proper preparation of the application. The other factor was that Bethel had to rely on its consulting engineer in regard to the technical portion of its application. It was this portion from which there were the most substantial omissions. In any event, Bethel promptly and completely corrected all omissions as soon as they were brought to Bethel's attention. Also, there has been no evidence of willfulness or intent to conceal on the part of Bethel, nor is there any possible motive for Bethel to do so. Further, Bethel's unintentional and inadvertent omissions, and the reasons therefore, have been fully explained. Under the circumstances, no comparative demerit is warranted. See *Kenneth J. Crosthwait*, 79 FCC 2d 191 (1980); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982).

Issue 7 - Channel 62 Violation of Section 73.3514

140. The Channel 62 application as filed did not contain information required by Section II of FCC Form 301. Information concerning the officers, directors and shareholders of Channel 62, Incorporated and the Chambers was missing. Also missing was information required by questions 17(1) through 17(4). The necessary information was supplied in amendments dated July 12, 1982 and August 13, 1982. There is no evidence that Channel 62 intended to conceal or mislead the Commission and no motive for doing so is apparent. However, since the material

[33] The parties also argue that United has failed to establish its financial qualifications because no evidence has been presented that United and its principals could provide collateral for the loan and the bank letter fails to state any knowledge of United's financial condition or the financial condition of its principals. These contentions are rejected since it appears that the bank letter taken together with the testimony of various bank officials satisfies the requirements set forth in *Multi-State, supra.*

withheld is of decisional significance and in light of the considerable delay in supplying the information even after it was noted as missing in the *Designation Order*, a slight comparative demerit is warranted.

Issue 8 - Channel 62 Violation of Section 73.3526

141. On January 12, 1982, Mr. Bantle[34] was denied access to the Channel 62 public inspection file kept at the offices of the Chambers. First, Mr. Bantle was told to return later in the day by Chambers' employees who were unfamiliar with the existence of the file. When he returned, Mr. Bantle was denied access to the file by Mr. Pick, a principal of Channel 62, who insisted on knowing what organization Mr. Bantle represented. Mr. Pick also apparently jumped to the conclusion that Mr. Bantle had earlier misrepresented himself as being from the FCC and was so concerned about that possibility that he refused to let Mr. Bantle view the file that day. Mr. Pick asked Mr. Bantle to return another day after he called his counsel in Washington. Mr. Pick and the Chambers employees violated Section 73.3526 of the Rules. It has long been established that applicants may require personal identification (names and addresses) of people wishing to inspect the public file. They may not, however, require people to identify the organization they represent. *WBRN, Inc.*, 32 FCC 2d 729, 730 (1971). Nor may applicants require that members of the public make an appointment in advance or return at another time. *Availability of Locally Maintained Records*, 28 FCC 2d 71 (1974). Although these violations by Channel 62 do not rise to the level of intentional misconduct or wanton neglect which would justify disqualification, the violations go beyond simple inadvertence. A slight comparative demerit is warranted.

Issue 9 - EBC Staffing

142. EBC proposes to operate its television station 12-13 hours a day, 7 days a week, with 6 full-time and 2 part-time employees. At issue is whether EBC has demonstrated the ability to effectuate its operational and programming plans with its proposed staff. "[T]he Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff." *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291, 292-93 (Rev. Bd. 1974).

143. EBC has not met that general standard. Its operation of the proposed Riverside station [35] is predicated on the ability of Ms. Keep to supervise all station personnel as general manager, perform the functions

[34] Mr. Bantle was an employee of a principal of Pan-Pacific Broadcasting, Inc., which at the time was a competing applicant in this proceeding.

[35] The proposed station is the first television station licensed to Riverside, a community of more than 170,000.

of station manager, news and public affairs director and program director, produce a nightly 10 minute news show, and host a weekly 1 hour talk show while undertaking ascertainment, representing the station in the community, gathering information for her news and public affairs programming, editing, producing and writing scripts, scheduling the station's programming, answering telephones, preparing agendas for other personnel and doing other menial talks. It is simply incredible that Ms. Keep, who has no broadcast experience, will be able to carry on all these duties.[36]

144. Furthermore, the proposal for engineering personnel provides little or no flexibility and is so tightly structured as to be highly vulnerable to any of a wide variety of likely mishaps. The absence of an engineer due to illness or other cause would seriously jeopardize the station's capacity to produce the proposed local programs and commercials. Ettlinger's only contingency plan in this regard — to expand the part-time engineer's work load by eight hours — would not cope with any absence of more than one day in a given week. Even brief absences in the course of the workday could vastly complicate if not destroy program production which must be effectuated in the space of one rigidly predetermined half-hour on weekday afternoons. The proposed staff would not be prepared to respond to fast breaking events occurring in Riverside. In this connection, plans for covering urgent local events were not considered in the staff proposal. Technical matters would often be in the hands of only one engineer. Even absent a technical emergency, this situation places unnecessary reliance on the reliability and competence of one employee. The narrowness of Ettlinger's anticipated production schedule would likely be a serious obstacle to its ability to work with the most active and significant of the Riverside community leaders. It is unlikely that three or four community leaders each week can be assembled promptly at 6:00 p.m. and their discussion immediately taped. At best, little more than 15 minutes of discussion could be recorded between 6:00 p.m. and 6:30 p.m., since news taping and editing would have to be done at the same time. Thus, the community participants would have to present themselves three or four times at 6:00 p.m. in order to produce an hour long talk show. At no time on the weekends will there be an engineering presence sufficient to work on producing the talk show. In response to specific questions concerning the manner in which the staff as proposed could possibly produce the talk show, Ms. Keep referred to "fluctuating" schedules. Unfortunately the present schedule, although deficient, is already contrived so as to maximize the engineer overlap necessary for production. The obvious truth is that at least one more

[36] Compare *Bisbee, supra*, involving a much smaller community where the staffing proposal for an FM station included a principal with extensive broadcast experience.

engineer would be required at the station to assure production of the talk show. In addition to the deficiences discussed, *supra*, EBC concedes that it has overlooked a necessary secretary/receptionist in its staffing plans.

145. The burden of proof on the staffing issue rested with EBC. Contrary to EBC's contention, the bare assertion that the proposed proposal represents a starting staff and can be expanded in the future, if necessary, is insufficient to resolve the issue in its favor. *Clarkston Broadcasters*, 12 RR 2d 1203 (1968). It is concluded that EBC has not shown a reasonable likelihood that its staffing proposal is sufficient to the task of operating the proposed station. EBC must be disqualified on this ground. See *Chapman Radio and Television Co.*, 19 FCC 2d 157, 162-63 (Rev. Bd. 1969).

Issue 10 - Family Violation of Section 73.3514

146. Two amendments to the Family application were not placed in the Family public inspection file in a timely manner. These amendments were not sent by Family's counsel to Mr. Dalton for forwarding to Family's public file as had been arranged for materials required to be placed in the file. While Mr. Dalton could have acted more diligently to request the amendments from Family's counsel for forwarding, he did not do so because he did not realize at this time that all amendments to an application are required to be placed in the public file and he assumed that if the particular amendments in question were required to be filed, his counsel would have forwarded them to him. Once Family was apprised that its public file was incomplete, the missing amendments were placed in the file and the file has been maintained complete, up-to-date and intact from that point. Since there is no evidence of an intent to conceal information or that a member of the public was harmed and in light of the *de minimis* nature of the violation, a comparative demerit is not warranted.

Comparative Issue[37]

147. The comparative issue must be decided in accordance with the *Commission's Policy Statement on Comparative Broadcast Hearings* (Policy Statement), 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, i.e., (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communication.

Diversification of Mass Media

148. KIST, Sunland, Bethel and United and their respective principals own no media interests. EBC itself holds no media interests. EBC's 60%

[37] Notwithstanding their disqualification, the applications of Channel 62, United and EBC are considered herein.

stockholder and President, Mr. Ettlinger, owns 23.18% of the license of station KUDO-FM, Las Vegas, Nevada. He holds debentures which if converted to stock, would increase his ownership interest in KUDO-FM to 47%. Mr. Ettlinger is a minor (6.37%) shareholder in station KDON/KDON-FM, Salinas, California and KBBQ/KBBY(FM), Ventura, California.[38] Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d at 394-5. Because Mr. Ettlinger's interests are less than controlling and the radio stations are not within the proposed service area, EBC will be given a slight comparative demerit *vis-a-vis* Sunland, KIST, Bethel and United.

149. Channel 62, the applicant, and its general and limited partners have no media interests. However, certain past and present directors of the Chambers, which holds 100% of the stock of Channel 62, Incorporated, one of the two general partners do have media interests. Messrs. Richter, Fisher and Singletary are owners, officers and directors of Inland Empire Broadcasters, licensee of radio station KPRO(AM), Riverside, California and KWTC/KZNS(FM), Barstow, California. Additionally, Mr. Rivera is a member of the board of directors of the Times Mirror Company, owners of newspapers and television stations. Ordinary these media interests, particularly the holding in the proposed city of license, would warrant a substantial diversification demerit. See *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976). However, the unique facts in this case justify a demerit of less magnitude. Thus, the overall policy of Channel 62, Incorporated is directed by its five-member board of directors. None of the individuals discussed *above* are presently or intend to be members of the board. In fact, Channel 62 has represented that they will not participate in any way on any matter involving the pending application or participate if a license is ultimately granted to Channel 62. Further, the Chambers, which elects the five member board, typically has approximately forty-two members. Even assuming Channel 62 had not represented the four media interest holders would not participate in its affairs, their influence in such a large body would clearly be negligible. Finally, the Riverside media interest is in a different service than the facility involved in this proceeding. On the basis of these facts, only a very slight demerit is warranted *vis-a-vis* Sunland, KIST, Bethel and United.

150. Family has no media interests. Mr. Dalton, one of its principals, had a very brief limited partnership interest in a construction permit for

[38] Mr. Ettlinger also owns and is President of Medallion TV Enterprises, Inc. a TV program distributor, and Jett Advertising Advertising Agency. Neither of these interests constitute mass media interests for purposes of comparative evaluation. See *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723-24 (Rev. Bd. 1981).

KSPR(TV), Springfield, Missouri. In light of the circumstances described *below*, this interest will not be counted against Family. Following the B cut-off date, Mr. Dalton became a limited partner in the proposed assignee of the construction permit for KSPR(TV). Prior to Commission approval, Mr. Dalton agreed to sell his interest. However, prior to consummation of the sale, the Commission approved the assignment. Both the acquisition of the interest and its divestiture were timely reported in one single amendment to the Family application. On the basis of these facts, Mr. Dalton's interest should not be treated less favorably than an applicant who, prior to the B cut-off date, signals his intention to dispose of a media interest. See *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813 (Rev. Bd. 1982). Ms. Freeman's 2% interest in High County Broadcasting, Inc., also will be discounted since she has no ownership interest nor any position of managerial significance with Family. In summary, KIST, Sunland, Bethel, United and Family are even. EBC warrants a slight demerit and Channel 62 a very slight demerit *vis-a-vis* the other five applicants.

Best Practicable Service to the Public Integration

151. In evaluating the applicant's integration proposals, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners - including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated" (*Policy Statement, supra*, at 395). The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Also, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979. Similarly, consultative positions will be given no weight. *Policy Statement*, 1 FCC 2d at 395. Thus, no integration credit will be awarded where a principal proposes to work in a non-managerial position. *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981).

152. KIST will receive 37.49% full-time quantitative integration credit. Mr. Fox (8.33%), Ms. Cooper (4.17%), Mr. Butler (8.33%), Mr. Austin (8.33%) and Mr. Koch (8.33%) will work full-time in management positions at the proposed station. KIST will receive no integration credit for the proposed part-time (20 hours) participation of Mr. MacCauley (12.5%

interest) and Mr. Cogbill (8.33% interest) as sales account executives. They will not perform management level functions in their role as salesmen.[39] *Bradley, Hand, supra; Scott & Davis, supra; New Continental, supra.* KIST's integration proposal is qualitatively enhanced in the following manner. Ms. Cooper is a female and a resident of Riverside. Ms. Cooper receives no credit for community involvement since her limited activities are purely social in nature. Mr. Austin is also a Riverside resident and has, to some degree been involved in civic activities. Mr. Koch resides in the proposed service area and is also involved, to some degree, in civic activities. Mr. Butler is also a resident of Riverside. He will receive no credit for civic involvement since such involvement ended in 1974. KIST claims minority enhancement credit on the ground that Fox is an Hispanic. Minority credit will not be awarded. Mr. Fox is not presumptively Hispanic because he does not have an Hispanic surname, nor does he claim to be Hispanic because his mother is Hispanic. The closest ancestor of possible Hispanic heritage is his paternal grandfather but this relative also apparently has the surname Fox, not an Hispanic surname. Further, Mr. Fox is not a fluent speaker of Spanish; Spanish was spoken only infrequently in his home by his father. Mr. Fox was born in this country, as were both his parents and he has no immediate relatives living outside this country. Moreover, Mr. Fox apparently does not belong to any Hispanic organizations in Riverside. Mr. Fox will receive a minor enhancement for future local residence. *Policy Statement*, 1 FCC 3d at 396; *Merrimack, supra.* Although KIST receives no integration credit for Mr. MacCauley's participation, KIST is entitled to slight residual credit since Mr. MacCauley is a local resident and proposes to devote some time to station affairs. See *Midwest, supra.*

153. EBC will receive 20% full-time quantitative credit since Ms. Keep (20% interest) is proposed to work full-time as the station's general manager. EBC will receive no integration credit for Mr. Ettlinger's (60% interest) proposed part-time participation. Mr. Ettlinger proposes to work one day at the station. Mr. Ettlinger will hold no title and all management functions are to be performed by Ms. Keep. Mr. Ettlinger's statement that he will supervise Ms. Keep on his one day at the station is too nebulous to be credited as a management function. Further, Mr. Ettlinger's claim that he will spend 16 hours on behalf of the station acquiring programming must be discounted. Initially, it must be regarded as an employee type activity, rather than a management level position, since Ms. Keep is in

[39] Mr. MacCauley and Ms. Cooper are husband and wife. KIST argues that Mr. MacCauley's interest should be attributed to Ms. Cooper for integration purposes, citing the Review Board's decision in *Absolutely Great Radio, Inc.*, FCC 83R-9, released February 4, 1983. However, the Board's holding has been reversed by the Commission, *Absolutely Great Radio, Inc.*, FCC 83-464, released October 13, 1983.

charge of programming as well as all other aspects of the station's operation. In addition, Mr. Ettlinger's claim that he will spend 16 hours away from the station acquiring programming for the station is not supported. Mr. Ettlinger is currently a TV program distributor and it is not possible to determine whether the 16 hours will be spent acquiring programming for his TV program distribution business or the station. In this connection, Medallion, owned by Mr. Ettlinger, will supply the majority of the station's programming and the remainder will be acquired through barter arrangements. EBC's integration proposal is qualitatively enhanced by Ms. Keep's female status.

154. Sunland will receive 35% full-time quantitative integration credit for Mr. Soto's (35% partner) role as full-time general manager. The contention that Mr. Soto is not a true and actual owner of Sunland is rejected. It is true that Mr. Soto has not yet provided financial resources to Sunland to aid in the application and hearing process. However, assuming this factor is a crucial consideration in determining whether Mr. Soto is a true and actual owner,[40] it must be remembered that Mr. Soto is required to pay back any advances to him from future station profits. Further, Mr. Soto is fully obligated to contribute proportionately to finance the construction and operation of the station. Thus, it is clear that Mr. Soto has a financial stake in the Sunland partnership. In addition, the provisions of the partnership agreement, discussed in footnote 19, *supra*, make clear that Mr. Soto will participate fully in the management and control of the station. Sunland will also receive 55% part-time integration credit for Mr. Hodin's (55% partner) proposed part-time participation (20 hours) directing the general administrative and financial aspects of the station. Sunland's integration proposal is qualitatively enhanced in that Mr. Soto is Hispanic, is a longtime resident of Riverside and has been heavily involved in civic and community activities. Also, Mr. Hodin proposes to move to the Riverside area. Sunland receives no prior broadcast experience credit since Mr. Hodin has never been involved in the day-to-day operation of a broadcast station.

155. Bethel will receive 33.33% full-time credit. Bethel is a non-stock corporation. Mr. Vaughn is one of the three members of Bethel's Board of Directors. Mr. Vaughn is proposed as the full-time General Manager of the proposed station with authority to make all day-to-day decisions affecting station operations and programming, subject only to the policy directives of Bethel's Board of Directors, of which he is a member. Mr. Vaughn will be treated like a participating owner in a commercial

[40] Channel 62's Mr. Pick (Channel 62 Ex. 16 at 15, Bethel's Mr. Vaughn (Tr. 1360-61), Family's Ms. Kearney (Tr. 2364) and United's Mr. Digati (Tr. 2529-30) have also contributed no funds to their respective applicants for the costs of preparing and litigating their applications.

enterprise. As one of three directors of Bethel, he will be considered on the same basis as a 33.33% stockholder. *Farragut Television Corporation*, 8 FCC 2d 279 (1967); *Loyola University*, 12 RR 1017 (1956); *Las Misiones De Bejar Television Co.*, FCC 83R-10 released February 11, 1983. Bethel's integration credit is qualitatively enhanced by Mr. Vaughn's local residence and civic involvement.

156. Channel 62 will receive no integration credit. Mr. Pick is proposed as Channel 62's general manager. However, Mr. Pick, while one of two general partners of Channel 62, does not hold any ownership interest in the partnership or any of its various components parts and cannot be accorded ownership status. Even were Mr. Pick deemed to have some recognizable ownership interest, Channel 62 would receive no integration credit since Mr. Pick will be held to have committed himself to work only ten hours a week at the station. In its application, Channel 62 indicated Mr. Pick would devote "25%" of his time to the station. In response to interrogatories, Mr. Pick stated that he would devote approximately 10 hours per week to the operation of the station. In its hearing exhibits and in Mr. Pick's testimony, an attempt was made to expand his time commitment to twenty hours. Channel 62's attempt to improve its comparative position by offering evidence at variance with previous representations will not be allowed to succeed. The parties are entitled to rely on representations made in the course of discovery and Channel 62 will be held to such representations.[41]

157. Family seeks integration credit for Ms. Kearney, a Black female and asserted 95% stockholder,[42] who will work full-time as the station's general manager. However, the facts surrounding the formation of Family and its participation in the application process, detailed in findings 104-112, *supra*, lead inevitably to the conclusion that Mr. Dalton, asserted 5% stockholder in Family, is the true and actual owner of the applicant and Ms. Kearney must be considered as having no ownership interest.

158. Ms. Kearney, the purported 95% stockholder, did not pay for her stock. Ms. Kearney also is not obligated to advance any funds for the prosecution of the application or the construction and operation of the station. All funds so far advanced, which totalled over $70,000 at the time of hearing, were advanced by Mr. Dalton, the purported 5% stockholder. For the funds needed for construction of the station, Mr. Dalton obtained a loan letter for $500,000 from the Commerce Union Bank, his primary

[41] Channel 62 also proposed Betty Cox Johnson, a limited partner as an integrated principal. However, limited partners get no integration credit. *Absolutely Great Radio, Inc.*, FCC 83-464, released October 13, 1983, footnote 8. In addition, Ms. Johnson's testimony made clear that she would not have a decision-making role at the station. Her testimony was, therefore, stricken to the extent it proposed integration (Tr. 1330).

[42] Even if integration credit were awarded to Family, it could only be for the 80% stock ownership held by Ms. Kearney prior to the "B" cut-off date.

bank, and where he maintains substantial funds. The inclusion of Ms. Kearney as a guarantor is devoid of meaning. Mr. Dalton did not even give the bank Ms. Kearney's financial statement since, as recited by Mr. Dalton, the bank was not interested in her financial situation. It is clear that the commitment letter was predicated solely on Mr. Dalton's financial status, that any subsequent agreement by the bank to loan money to Family will be wholly dependent on Mr. Dalton's financial picture at the time, and that if such loan is made, the bank will be looking solely to him for repayment if Family is unable to do so. Mr. Dalton also has agreed to provide a personal loan of up to $500,000 in case the bank loan proves inadequate to cover Family's costs.

159. In *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978) *aff'd.* 86 FCC 2d 423 (1981), the Commission found nothing wrong with a controlling principal giving the gift of a 5% stock interest to a trusted former employee. A gift of a 95% controlling interest is a totally different matter, particularly, where, as here, Mr. Dalton met the recipient only once before and knew only because of his wife's association with her at a Paris design school. Mr. Dalton is an experienced businessman and entrepreneur. His willingness to accept a 5% ownership interest and assume all the financial risks is "inconsistent with human experience and normal business practice" *Henderson Broadcasting Co.*, 63 FCC 2d 419, 429 (Rev. Bd. 1973). The only plausible explanation is that Family's ownership structure is a facade to maximize Family's chances of winning the comparative hearing. In reality, control has and will continue to reside with Mr. Dalton.

160. Moreover, one of the most effective methods of control of any business is the control of its finances. *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937). There can be no doubt that Mr. Dalton has financial control of the corporation. As pointed out, *supra*, Family is dependent on Mr. Dalton for funds necessary for the prosecution, construction, and operation of the station. In addition, Mr. Dalton has in the past, and will continue to have complete control over the use of such funds. Riverside Family has a corporate bank account at the Commerce Union Bank in Nashville, Tennessee, the same bank where Mr. Dalton obtained the loan letter. Mr. Dalton set up the bank account. From approximately June 1981 until January or February of 1982, Mr. Dalton and an associate of his, one Dr. Crants, were the sole signatories on the corporate checking account, and both men have written checks on the account. Mr. Dalton and Dr. Crants share an office suite and are partners in at least two other television ventures. Sometime in the early part of 1982, Dr. Crants was removed as a signatory and Kearney was added, but Ms. Kearney could give no explanation as to why this was done. Although Ms. Kearney is currently a signatory on the account, she has written no checks on behalf

of the corporation and Mr. Dalton has possession of the checkbooks. Thus, the fact that Kearney is now a signatory is merely an empty formality and has no bearing on the question of who has financial control of the corporation. Not only does Mr. Dalton have possession of the checkbooks, he also has complete control over how much money will be deposited in the account and when it will be deposited.

161. The evidence at the hearing also establishes that Ms. Kearney has never exercised control of the corporation. The Family application states that Ms. Kearney and Mr. Dalton are directors, but there has never been a formal meeting of directors or any formal action by the directors. Moreover, there are no minutes concerning possible informal meetings held by telephone by Mr. Dalton and Ms. Kearney. There also were no meetings and no formal actions taken by Ms. Kearney and Mr. Dalton as stockholders of the corporation. Ms. Kearney is stated to be the President of the corporation, although there has never been any action by the Board of Directors electing her to that position. The record is completely devoid as to any duties she has performed as President of the corporation, but does show that Mr. Dalton has performed at least some of the duties reserved for the President by the by-laws, such as signing the corporation's stock certificates and executing contracts on behalf of the corporation. Mr. Dalton also established the corporate bank account and did not tell Ms. Kearney he made Dr. Crants a signatory. In this connection, no board of directors action was taken to establish the bank account or make Dr. Crants a signatory.

162. The findings discussed, *supra*, require the application of the corporate fiction-alter ego doctrine of Henderson, *supra*. In *Henderson*, the Review Board held that all *de jure* aspects of a corporate organization must be disregarded when failure to do so would enable the corporate device to circumvent the public interest, cause unfairness, or perpetrate inequities. In such circumstances, the stockholders may be treated as if the corporation does not exist. Similarly, in *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), the Review Board awarded no integration credit to two asserted partners for a similar reason. It held that the individuals were not in fact true and actual owners even though they would share in profits and losses, because a special partnership agreement vested control of the partnership in another person. The Review Board stated:

> It may be true ... that applicants do structure their composition in a manner designed to achieve comparative preferences based upon the *Policy Statement* and Commission precedent relating to the comparative criteria, and that such fashioning is not necessarily improper or otherwise inconsistent with the public interest. Nevertheless, it is patently evident that such structuring must conform with the substances—not merely the labels—of the comparative criteria ... Simply put, no applicant is required to seek a comparative integration preference; it is perfectly free

to operate a station on the basis of absentee ownership with supervision—but not control—delegated to employees. However, when an applicant chooses to seek a preference in a comparative hearing on the integration criterion, its proposal cannot be a facade. *Id.* at 7.

163. Under the principles of *Henderson* and *Berryville*, Ms. Kearney cannot be considered a true and actual owner of Family. To allow Family to claim an 80% integration credit would "make a mockery of the underlying objective of the integration criterion" *Henderson, supra,* 63 FCC 2d at 426. Family argues that the principles of *Henderson* and *Berryville* are inapplicable in the absence of a special corporate provision specifically undermining Ms. Kearney's purported controlling equity interest. The short answer is that there is no indication that Ms. Kearney has ever exercised control or that Mr. Dalton's minority interest has served as an obstacle to his exercise of control. Furthermore, a special corporate provision vesting control in Mr. Dalton is unnecessary. Family overlooks the fact that one of the most effective methods of control of any business is the control of its finances. See *Heitmeyer, supra.* Mr. Dalton has total financial control of Family. By virtue of that fact, he is effectively running the corporation. Ms. Kearney can recommend a course of action but she is powerless to act without first obtaining Mr. Dalton's approval. In short, she possesses no ownership attributes; she is merely an employee of Mr. Dalton's. It is clear that is what the parties intended. Further, contrary to Family's assertion, the fact that Ms. Kearney will be general manager and Mr. Dalton will not have an active role does not support the award of integration credit. Family is merely proposing to operate the station "on the basis of absentee ownership with supervision—but not control—delegated to employees" *Berryville, supra,* 70 FCC 2d at 7. Therefore, Family receives no integration credit.

164. United will receive credit for 45% full-time quantitative integration. In this connection, the proposed integration of Andrew Kimm (20% interest), Nicholas C. Chun (20% interest) and Bong Koo Kim (5% interest) is supported and will be credited. United will not receive credit for Mrs. Kimm's (15% interest) proposed participation as Personnel Director. Her testimony and that of her husband indicate that her overall role is plainly non-managerial and cannot be credited.[43] See *Bradley, Hand, supra.* United will also not receive integration credit for Mr. Digati's proposed participation as Public Relations and Public Service Director. Mr. Digati's role is clearly non-managerial. He will not have a supervisory role over

[43] It is also argued that Mrs. Kimm's integration credit must also be disallowed since at the present time she cannot communicate in English in any meaningful manner. The argument is rejected. Mrs. Kimm, a graduate of Seoul National University in Korea, is currently enrolled in English language courses. It is reasonable to assume that she will be sufficiently fluent in the English language to carry out her assigned functions by the time this proceeding is over. To argue otherwise is pure speculation.

other personnel at the station. In addition, Mr. Kimm and the program director will make the decisions about programming. Mr. Digati's principal function is to serve as "goodwill ambassador" to the community (See Tr. 2693-94) and no integration credit is warranted. See *New Continental, supra*; *Bradley, Hand, supra*. Mr. Digati's proposed integration must be rejected for another reason as well. He has no intention of resigning his post as City Councilman and refused to rule out the possibility of his running for Mayor of Riverside in three years. That office is a full-time salaried position. Mr. Digati has given thought to the idea of running for Mayor and has actually discussed the prospect with members of the community. The Commission's test has always required integration on a permanent basis. *Rockland Broadcasting Co.*, 36 FCC 303, 314 (1964). No comparative credit is given when work at the station lasts for some time but is uncertain after that point. *Gainesville Media, Inc.*, 72 FCC 2d 807, 814 (1978) (citing note 6 of the *Policy Statement*). United's integration proposal is qualitatively enhanced in that Messrs. Kimm, Chun and Kim are of Korean heritage and entitled to minority credit. In addition, Mr. Kimm and Mr. Kim propose to move to Riverside. Also, Mr. Kim is entitled to credit for past broadcast experience. Further, United receives slight residual credit for Mrs. Kimm's and Mr. Digati's proposed involvement. Mrs. Kimm is a member of a minority group and proposes to devote time to the station. Mr. Digati is not a member of a minority group. However, he is a Riverside resident, and has been deeply involved in community affairs. See *Midwest, supra*.

165. In summary, KIST receives 37.49% full-time quantitative integration credit, qualitative enhancement, and slight residual credit for Mr. McCauley. EBC receives 20% full-time quantitative credit plus qualitative enhancement. Sunland receives 35% full-time quantitative credit, 55% part-time credit, and qualitative enhancement. Bethel receives 33.3% full-time credit plus qualitative enhancement. Channel 62 and Family receive no integration credit. United receives 45% full-time quantitative credit, qualitative enhancement plus slight residual credit for Mrs. Kimm and Mr. Digati. Sunland's proposal is the superior integration proposal. Both United and KIST propose greater full-time participation. However, neither proposes to integrate a majority of its stock ownership. The differential between KIST's and United's full-time integration proposals (37.49% and 45%) and that of Sunland (35%) is more than offset by the fact that only Sunland proposes to integrate a majority of its stock ownership (90%). Its proposal, unlike United's and KIST's, furthers the Commission goal of maximum ownership participation in station affairs. See *Policy Statement, supra*, at 395; *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 587 (Rev. Bd. 1973); *Gilbert Group, Inc.*, 50 RR 2d 81, 92 (Rev. Bd. 1981). It is well established that qualitative attributes of participating owners

may enhance the value of a integration proposal but cannot overcome clear quantitative differences. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). Moreover, Sunland's qualitative enhancement consisting of 35% minority involvement, long time residence and long time and outstanding involvement in civic and community affairs (Mr. Soto) and the proposal of the 55% partner (Mr. Hodin) to move to the Riverside area increases, rather than decreases, Sunland's advantage over United and KIST. Sunland enjoys a slight integration preference over United and a slight to moderate preference over KIST. As between United and KIST, United will be given a slight preference. Sunland also enjoys a moderate preference over Bethel (33.3% full-time), a moderate preference over Ettlinger (20%) and a moderate to substantial preference over Family and Channel 62 (no integration credit).

Final Comparative Evaluation

166. Sunland, KIST, Bethel, United and Family are even under the diversification criterion. EBC warrants a slight demerit and Channel 62 a very slight demerit *vis-a-vis* the other five applicants. Sunland enjoys a slight integration preference over its nearest competitor, United and a slight to moderate integration preference over KIST, the third best applicant. It is therefore concluded that the public interest is better served by a grant of Sunland's application. The ranking of the applicants is in the following order: (1) Sunland, (2) United, (3) KIST, (4) Bethel, (5) EBC (6) Family and (7) Channel 62 (which also receives slight comparative demerits for violations of Sections 73.3514 and 73.3526).[44]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Sunland Communications Corporation IS GRANTED and the applications of KIST Corp., Ettlinger Broadcasting Corporation, Bethel Broadcasting, Inc., Channel 62, A Limited Partnership, Riverside Family Television, Inc. and United American Telecasters, Inc. ARE DENIED.[45]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

[44] Channel 62, EBC and United have been disqualified.

[45] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Employment, Minority, Acceptable Level by Licensee (EEO)
Petition to Deny
Renewal, of Licensee, Deferred

License renewal application deferred pending review of other matters. Petition to deny alleging licensee failed to comply with Commission's EEO rule denied but licensee required to submit periodic EEO reports. Co-owned and co-located FM station also required to submit EEO reports.
—*Metrogeneral Communications of Nashville, Inc.*

FCC 84-354

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Metrogeneral Communications of Nashville, Inc.[1]	File No. BR-820319XX
For Renewal of License of Station WJRB, Madison, Tennessee	

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1984; Released: July 31, 1984

BY THE COMMISSION:

1. The Commission has before it for consideration: the above-captioned application; a petition to deny[2] the application filed by the National Black Media Coalition, the Middle Tennessee Community Communications Coalition, and the Nashville Branch of the NAACP (petitioners); and various related pleadings.[3] The petitioners urge that a hearing is

[1] On May 8, 1984, the Commission granted the pro forma assignment of the WJRB license from JACO, Inc. to Metrogeneral Communications of Nashville, Inc.

[2] Although the licensee argues that the petitioners' pleading can only be considered as an informal objection, we have already determined that the pleading qualifies as a petition to deny. *Renewals of Indiana, Kentucky and Tennessee Broadcast Stations*, FCC 83-574, 54 R.R. 2d 1473 (1983).

[3] Also before us are: (i) the licensee's opposition; (ii) the petitioners' reply; (iii) a supplement to the petition to deny filed March 14, 1983; (iv) the licensee's opposition; (v) the petitioners' reply; (vi) the licensee's motion to strike; (vii) a letter of inquiry to the licensee

warranted because of the licensee's alleged failure to comply with the Commission's EEO rule (Section 73.2080 of the Commission's Rules) with respect to affirmative action. In addition, they charge in a supplement to the petition that the licensee discriminated against a former employee, Mr. Michael Smith, because of his race and that it misrepresented facts in claiming it provided him training and had an intern program with the Nashville School of Broadcast Technique.[4]

2. As originally submitted, the station's license term Annual Employment Reports show the following:

	Overall			*Top Four Categories*		
Year	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
1982[5]	17	4 (23.5)	2 (11.8)	16	4 (25.0)	2 (12.5)
1981[5]	16	4 (25.0)	1 (6.3)	15	4 (26.7)	1 (6.7)
1980	19	7 (36.8)	-0-	17	6 (35.3)	-0-

When these figures are compared with labor force data for the Nashville MSA[6] — 39.5% women and 15.2% non-white — it appears that women were reasonably represented on the station's staff throughout the license term while minorities increased in number to a point where they, too, were reasonably represented on the staff by the time of the filing of the station's renewal application. The station's EEO program, as originally submitted, was consistent with the data in the employment reports. Although the program suggests that no referrals were received from the listed recruitment sources, the station's four hires during the period March 1, 1981 to March 1, 1982 included two women and one minority. In addition, the program shows that on-the-job training was provided to two

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dated August 15, 1983; (viii) the licensee's response; (ix) a second letter of inquiry to the licensee dated January 8, 1984; and (x) the licensee's response. With respect to the licensee's motion to strike, it is argued that the petitioners' reply of May 18, 1983 is supported entirely by an unsworn statement and is therefore defective. However, Section 1.16 of our rules (added by *Order*, FCC 83-66, released February 17, 1983) permits the use of an unsworn declaration in lieu of an affidavit. Given the foregoing, we deny the licensee's motion to strike.

[4] With respect to the petitioners' charges of discrimination against Mr. Smith, we note that the EEOC dismissed his charge against the station on July 27, 1983 (EEOC No. 015-83-0510). Moreover, as for the petitioners' assertions concerning Mr. Smith's "training," we note that the licensee has submitted documentation which suggests that Mr. Smith's supervisor and Mr. Smith had several discussions regarding his job performance during the time of Mr. Smith's employment at the station. While Mr. Smith may not view such discussions as a form of "training," we believe that the licensee's characterization is not so unreasonable as to raise a substantial question of misrepresentation. Accordingly, we find that no further action on any of the allegations concerning Mr. Smith is warranted.

[5] The station lists no employee in the clerical category in either 1981 or 1982. Further, although the station used a March 15 payroll period for its 1980 and 1982 reports, it used a May 1 payroll for 1981, contrary to the instructions accompanying FCC Form 395.

[6] Madison is a suburb of Nashville, and the licensee maintains its studio in the city of Nashville.

minority employees and that the station had an internship program with the Nashville School of Broadcast Technique. However, the program contains no information concerning promotions nor any analysis of the station's recruitment techniques or the overall effectiveness of the affirmative action plan. Focusing on these lapses, the petitioners argued that the licensee was inattentive, both in filling out and implementing its affirmative action plan.

3. In response to the petitioners' criticisms, the licensee submitted a revised EEO program as well as the affidavit of the station's operations manager. The revised program clearly shows that no referrals were received by the station with respect to the four jobs filled during the period March 1, 1981 to March 1, 1982. However, the station's operations manager states that efforts to secure applications from minorities were made throughout the license term and that the station did hire the one minority referred by the Job Service of Tennessee during the period March 1, 1980 to March 1, 1981. In any event, the licensee promises that additional efforts to hire minorities will be made, and it argues that its EEO program was successful, because: one of its four recent hires was a minority; a minority was promoted to traffic manager; and the station's renewal application profile was within the Commission's processing guidelines.[7] Finally, the licensee repeats that it had an internship program with the Nashville School of Broadcast Technique. According to the licensee, "approximately" ten persons, including two minorities and two women, participated in the program.

4. As noted, the petitioners have alleged discrimination against a former employee and have challenged the licensee's assertions regarding internships and training. In opposition, the licensee submitted a statement from the director of education of the Nashville School of Broadcast Technique (NSBT) and an affidavit from Ms. Carol Simmons, a Black employee at the station. According to the director, "KZ 100, formerly WJRB,"[8] employed "a number" of NSBT students as interns as part of an on-going program which began in the fall of 1980. Moreover, Ms. Simmons relates that she received training in the areas of traffic and sales. However, contrary to the hiring information in the EEO program, where

[7] *EEO Processing Guidelines*, FCC 80-61, 46 R.R. 2d 1693 (1980).

[8] On April 27, 1982, the license of (now) Station WJKZ(FM) Franklin, Tennessee, was assigned to Mack Sanders, the 100% shareholder of JACO, Inc. On May 19, 1982, the WJKZ(FM) license was assigned to JACO, Inc. (File No. BALH-820507HV), while on October 19, 1982, the license of WJKZ(FM) was assigned to Proud Country, Inc., which is wholly owned by JACO, Inc. (File No. BALH-821004AG). Finally, on May 8, 1984, the licenses of WJRB and WJKZ(FM) were assigned to Metrogeneral Communications of Nashville, Inc., the stock of which is controlled by Mr. Sanders. Although WJRB and WJKZ(FM) are licensed to different locations, both suburbs of Nashville, both stations maintain studios at the same address in Nashville.

the licensee reported that only one of its hires during the period March 1, 1981 to March 1, 1982 was a minority, Ms. Simmons states that she and Mr. Smith (the minority who claimed he had been discriminated against by the station), were hired in April and July 1981, respectively. Moreover, in an apparent contradiction of the station's 1981 Annual Employment Report, wherein a Black female is listed as an official and manager, Ms. Simmons declares that she was "in training" to do traffic in April 1981 and that she did not become the station's traffic manager until early 1982.

5. In light of the foregoing, the licensee was directed to submit a list of job applicants, hires, promotions and terminations, as well as a description of its efforts to recruit for each position filled and a list of employees or participants in any training or internship program. The licensee was further advised of the noted inconsistencies and was directed to correct any erroneous reports and explain why the errors occurred.

6. The licensee filed its response on September 21, 1983. No comments were filed by the petitioners. The report shows that twenty-six license term hires, all for upper-level positions, were made. No job titles were provided. Of the new hires, six (23.1%) were women and three (11.5%) were minorities (two Blacks and one American Indian). Seven persons, including three women and two minorities, were hired during the period referenced in the station's EEO program. However, the licensee provides no explanation as to why the station's list of hires reflected a greater number of total hires, women, and minorities than reported in the station's EEO program. Concerning job applicants, the licensee did not submit a list but explains that applications were received continuously and were "pooled;" consequently, it could not match a particular application with a particular job vacancy. Nonetheless, the licensee notes that it hired approximately one-half of the minorities from whom applications were received. As for promotions and training, the licensee's response reflects three promotions, all women, one of whom is a minority, and six interns, two of whom have no connection with the NSBT. No explanation is provided as to why the number of interns listed was less than the ten interns reported in the licensee's opposition. With respect to Ms. Carol Simmons' classification, JACO contends that its listing of her as an official and manager in 1981 was correct. It states that she was given the duties of traffic director after being at the station for two weeks, and it points to Ms. Simmons' statement in her affidavit that she was "in a decision making position after being employed no longer than four weeks." Finally, the licensee reports that WJRB had experienced a significant loss of staff so that as of July 1, 1983, the station employed only six full-time employees, including two women and one minority. However, one month later, JACO filed an erratum to its September 21, 1983 response in which it states that many of the WJRB employees were

"transferred" to "FM," although it also relates that at least four "former" employees continued to perform work for WJRB.

7. As noted, the licensee did not provide job titles, nor did it explain why its EEO program data on job hires does not correspond with its license term list of hires. Neither has the licensee explained why its opposition pleading's claims concerning internships were not corroborated by its license term list of interns. Similarly, it did not state why its list of hires reflected Ms. Simmons as an official and manager, even though she was hired as a receptionist. Accordingly, a second letter of inquiry was sent to the licensee in an effort to resolve these questions. In addition, because the licensee's submissions suggested that WJRB and a co-owned and co-located station, WJKZ(FM), were being operated as one unit, the licensee was asked to state why the Commission should consider the EEO program and profile of WJRB to be separate from those of WJKZ(FM).

8. The licensee filed its response on February 22, 1984. No comments were submitted by the petitioners. The station's new list again reflects twenty-six hires, including six women and three minorities, and sets forth the job title of each person hired. Analysis of these data, in conjunction with the licensee's list of promotions, shows that all but two of the station's new hires were immediately placed in upper-level positions, while the two women hired as clericals (bookkeeper and receptionist) received promotions during the license term (to office manager and traffic director, respectively). Concerning the discrepancy between the station's list of hires and its EEO program's job hire figures, the licensee states that the more recent information is correct and that the errors in the EEO program were inadvertent. With respect to its intern program, the licensee explains that its list of interns did not include those persons who participated in, but did not complete, the program; consequently, it urges that no discrepancy warranting further action exists. Finally, the licensee contends that WJRB's profile[9] and program should not be combined with those of WJKZ(FM). In this regard, the licensee asserts that although WJRB and WJKZ(FM) occupy the same building, they have separate studios and separate staffs. At the same time, however, the licensee concedes that "WJKZ employees do some work for WJRB, but . . . are not compensated for that work." Statement of Don Keith, p.3. Specifically, the licensee's submissions indicate that sales, clerical, technical, news, and managerial functions of WJRB are handled by "WJKZ" employees.

9. Although the licensee's EEO submissions were inaccurate in a number of respects, we do not believe that the discrepancies raise a substantial question of fact regarding the licensee's candor. We note initially that the licensee's assertion concerning its erroneous EEO

[9] In this regard, the licensee states that as of February 1984, WJRB employed only three persons full-time and one person part-time.

program job hire figures — that the errors were inadvertently made — is unrebutted. In addition, the magnitude of the error — seven hires actually made instead of the four reported — is not so great as to suggest a motive to deceive. Moreover, we find it unlikely that the licensee would have deliberately understated the percentage of minorities actually hired during the EEO program reporting period,[10] and it appears to us that the error resulted in part from the licensee's failure to use the proper payroll period for the station's 1981 Annual Employment Report since use of the proper period — March 15 rather than May 1 — would have confirmed two minority hires between March 1981 and March 1982 rather than the one now reflected in the station's Form 395s.[11]

10. Likewise, we find that the petitioners' charges concerning the licensee's internship program warrant no further inquiry. The licensee's submissions clearly show that it had an internship program during the 1979-1982 license term with the Nashville School of Broadcast Technique, and it has adequately explained the apparent inconsistency between its opposition pleading's assertion regarding the number of participants in the program and its list of interns. Thus, although we admonish the licensee for its failure to set forth clearly at the outset that its list of interns did not include those who had participated in but had not completed the program, we are satisfied that the licensee's submissions raise no substantial question about its candor.

11. Finally, although we find that the licensee's classification of Ms. Simmons as an official and manager is inaccurate, we believe that no hearing issue is raised. Initially, traffic managers are generally classified as clericals and may be classified as a manager only when the licensee requires managerial functions of the position. Here, Ms. Simmons' hiring date, April 1981, and the licensee's descriptions of her duties as traffic manager, *i.e.*, responsibility for the daily logs and for local and national traffic calls and mail, indicate that she should not have been included in the 1981 Annual Employment Report reflecting a March 1981 payroll period, and that she should have been classified as a clerical employee in the 1982 report. However, because the licensee's decision appears to be based on a misunderstanding of our Form 395 instructions, we find that the licensee's classification decision does not raise an issue about its candor. *See Metropolex Communications of Florida, Inc.*, FCC 84-71, 55 R.R. 2d 886 (1984). Accordingly, while we are satisfied that the licensee's inaccurate reporting of job hire figures and interns as well as its

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[10] *See Northern Television, Inc.*, FCC 83-504, at n. 40, released November 1, 1983.

[11] *Supra* note 5. The instructions accompanying FCC Form 395 state that a payroll period in January, February, or March is to be used and that the same payroll period is to be used for each year.

misclassifications do not warrant further inquiry, we admonish the licensee for its carelessness.

12. With respect to the licensee's EEO program, we are concerned about the licensee's efforts to recruit and hire minorities. Although two of the seven persons hired during the EEO program reporting period (March 1, 1981 to March 1, 1982) were minorities, none of the station's sixteen preceding license term hires was a minority. Further, while the licensee insists that WJRB now employs less than five persons full-time, WJRB and WJKZ(FM) are operated in a manner which suggest that they are one employment unit[12] and that they have experienced difficulties in locating minorities. In this regard, we find that the station's Annual Employment Reports, when corrected as to Ms. Simmons and when combined to reflect more accurately the profile of the stations in 1983, reflect the following with respect to minority employment:

	Overall		*Top Four Categories*	
	Total	*Minorities*	*Total*	*Minorities*
1983 (WJRB and WJKZ (FM))[13]	20	1 (5.0%)	19	1 (5.3%)
1982	17	2 (11.8%)	15	1 (6.7%)
1981[14]	17	0	15	0
1980	19	0	17	0
50% and 50% of MSA labor force		7.6%		7.6%

Accordingly, in order to monitor more closely the stations' performance, we shall require the submission of EEO progress reports.

13. Accordingly, IT IS ORDERED, that the petition to deny filed by the National Black Media Coalition, et al. IS DENIED.

14. IT IS FURTHER ORDERED, that the license renewal application for Station WJRB IS DEFERRED pending review of other matters.[15]

[12] The stations operate out of the same address in adjacent studios, and they share a common management, news staff, sales staff, and office personnel. Given these circumstances, we are not persuaded that we should view the stations as separate for EEO purposes. *Renewals of Alabama and Georgia Broadcast Stations*, FCC 83-413 at nn. 10 and 15, released September 19, 1983; *Leflore Broadcasting Co.*, 65 F.C.C. 2d 556, 562 (1977), *aff'd Leflore Broadcasting Co.* v. *FCC*, 636 F.2d 454 (D.C. Cir. 1980).

[13] We are considering Ms. Simmons as a salesperson in 1983 because her affidavit shows that she was acting as such at that time.

[14] The 1981 report has been corrected to reflect a March 1981 payroll period. It therefore includes two white males who left WJRB in April 1981 and does not include Ms. Simmons.

[15] Because the licensee's submissions also raised questions as to its compliance with Sections 73.1125 (main studio rule) and 73.1130 (program origination rule), a letter of inquiry dated June 29, 1984 was sent to the licensee. A response to that inquiry has been received, and the staff is reviewing the matter to determine what action, if any, is appropriate.

Nevertheless, the licensee is hereby made subject to EEO reporting conditions specified herein. Further, Station WJKZ(FM) is also hereby ordered to comply with the reporting condition.[16] In this regard, the licensee is to submit in one report an original and one copy of the following information no later than thirty (30) days from the release of this Order. In addition, it is directed to file the same information for two years thereafter, with the second and third reports being due on August 1, 1985 and August 1, 1986:[17]

(a) a list of persons hired as well as all persons who applied for each position filled during the twelve months preceding July 15, indicating their referral or recruitment source, job title, FCC Form 395 classification, part-time or full-time status, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to each filing date, by job title and FCC Form 395 classification with part-time or full-time status indicated (ranked from the highest paid to the lowest paid but *not* including salary) date of hire, sex and race or national origin;

(c) a narrative statement detailing the station's efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of minority applicants;

(d) a list of all promotions during the twelve months preceding July 15, showing the former and subsequent positions, date of promotion, and sex and race or national origin of the person promoted.[18]

15. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail - Return Receipt Requested a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[16] Jurisdiction for the filing requirement for the licensee of WJKZ(FM) is based on Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b).

[17] Upon submission of the third report, the Commission will review the licensees' EEO performance, and if we determine that they have developed an effective EEO program, no further reports will be required.

[18] As indicated, the licensee need *not* supply the *names* of the persons referenced in the above lists. Further, the licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division at (202-632-7069) for information on the preparation of employment reports.

Abuse of Process
Carelessness
Comparative Hearing
Diversification
Ownership and Management, Integration of
Television Station, Authorization

Review Board affirmed Initial Decision; granted new TV applicant meriting slight preference for ownership integration (100% vs. 83.485%). Loser assessed two slight comparative demerits under "carelessness" and "misrepresentation" issues; its relationship to a noncommercial FM station and a private association membership magazine were too remote for diversification consideration. Affirmed ALJ's refusal to add abuse of process issue re settlement.
—*Minority B/cers of East St. Louis, Inc.*
BC Docket No. 82-378

FCC 84R-45

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Minority Broadcasters of East St. Louis, Inc. East St. Louis, Illinois	BC Docket No. 82-378 File No. BPCT-811208KG
Spectrum Telecommunications Corporation East St. Louis, Illinois	BC Docket No. 82-380 File No. BPCT-820127KJ
For a Television Construction Permit	

Appearances

William S. Reyner, Jr. and *Timothy J. Dowling*, on behalf of Minority Broadcasters of East St. Louis, Inc.; and *William S. Andrews, Carolyn G. Nussbaum*, and *Robert B. Pender*, on behalf of Spectrum Telecommunications Corporation.

DECISION

Adopted: June 5, 1984: Released: June 15, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS. BOARD MEMBER BLUMENTHAL NOT PARTICIPATING.

BOARD MEMBER JACOBS:

1. This proceeding currently involves the mutually exclusive applications of Minority Broadcasters of East St. Louis, Inc. (Minority) and Spectrum Telecommunications Corporation (Spectrum) for authority to construct a new television broadcast station to operate on Channel 46 at East St. Louis, Illinois. By Hearing Designation Order, 47 Fed. Reg. 31958, published July 23, 1982, these applications were designated for consolidated hearing on the standard comparative issue only.[1] Subsequently, presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) added issues against Spectrum to determine whether it exhibited carelessness or willful disregard of the Commission's application and filing requirements in preparing and filing its technical application, Memorandum Opinion and Order, FCC 82M-3261, released October 20, 1982, and to determine whether it misrepresented that its answers to interrogatories reflected information derived from its principals, Memorandum Opinion and Order, FCC 83M-1237, released April 14, 1983. He also ruled that evidence on comparative coverage would be considered under the standard comparative issue. FCC 82M-3261, *supra*, at para. 10.

2. The Initial Decision (I.D.), FCC 83D-63, released November 16, 1983, granted Minority's application. In reaching this result, the ALJ first found that Spectrum was not disqualified under the carelessness and misrepresentation issues, but he assessed it a moderate comparative demerit for its "negligence or lack of care." I.D., para. 65. He then determined under the standard comparative issue that the applicants were equal under the criteria of diversification of control and quantitative integration of ownership and management, but awarded Spectrum an overall moderate integration preference based on his evaluation of its principals' qualitative attributes. The ALJ ultimately ruled that because Spectrum's moderate comparative demerit reflected *actual* conduct in this proceeding evidencing untruthful representations made by a former Spectrum stockholder and principal and Spectrum's failure to exercise

[1] The applications of East St. Louis 46 Broadcasters, Inc. (File No. BPCT-820127KI) and Mahogony Entertainment Television, Inc. (File No. BPCT-820127KL), which were also designated for hearing, were dismissed with prejudice by the ALJ — the first, at its own request pursuant to a settlement agreement, and the second, for failure to prosecute. Order, FCC 83M-1640, released May 17, 1983.

good judgment and care in providing significant applicant information, this demerit was more important than the integration preference awarded Spectrum based on presumptions about its *future* conduct derived from its enhancement attributes; therefore, he granted Minority's application.

3. The proceeding is now before the Review Board on exceptions filed by both applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held March 8, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Minority's application will best serve the public interest, convenience, and necessity.

4. *Quantitative Integration of Ownership and Management.*[2] The ALJ's award of 100% full-time quantitative integration credit to Minority is unchallenged and will be affirmed. Minority's principals propose to participate in station management as follows: Steven C. Roberts, 46% owner, general manager; Michael V. Roberts, 46% owner, sales manager; Mark W. Roberts (4%), director of public affairs; and Artis Talley, Jr. (4%), operations manager. I.D., paras. 18, 22. The ALJ credited Spectrum with 98.5% full-time quantitative integration for the proposed participation of Frank L. Wyche, 7.5% owner, sales manager; Margaret Bush Wilson, 22.75% owner, public affairs and community production director; Curtis C. Crawford, 22.75% owner, producer of community-oriented programs; Thomas A. Hart, Jr., 22.75% owner, news and editorial director; Myrtle B. Officer, 7.735% owner, business manager and public relations director; and Marion E. Officer, Jr., 15.015% owner, coordinator of young adult and children's programs. I.D., paras. 16, 38. The ALJ found that the quantitative difference between Minority's 100% full-time credit and Spectrum's 98.5% credit was "unimportant." I.D., para. 69.

5. In its exceptions, Minority claims that Spectrum should receive no integration credit for Marion Officer's proposed participation as coordinator of young adult and children's programs because his role will not be managerial. In addition, it urges that Spectrum should not receive full credit for the proposed integration of both Mrs. Wilson as public affairs and community production director and Mr. Crawford as a producer of community-oriented programs because their roles substantially overlap. Minority concludes that, after Spectrum's integration is thus discounted, Minority is entitled to a clear quantitative integration preference. Spectrum replies that Mr. Officer, who it states will be producing, directing, and hosting his own programs, shaping policy formulation, managing a

[2] The exceptions pertaining to the carelessness and misrepresentation issues specified against Spectrum will be discussed at the end of the comparative analysis because we agree with the ALJ that disqualification of Spectrum is not warranted under the evidence adduced pursuant to these issues, and Minority does not suggest otherwise.

budget, and overseeing a production staff, will indeed have a managerial role. It also claims that the Wilson and Crawford roles will be complementary rather than overlapping, with Mrs. Wilson responsible for the station's public affairs policy and involved in public need ascertainment, public affairs programming coordination, and hosting her own program, and with Mr. Crawford developing and supervising local programming and production targeted to community needs, coordinating with the news director, and supervising the scheduling of all community programming.

6. We agree with Minority that Spectrum is not entitled to the full 98.5% credit awarded by the ALJ. Turning first to Marion Officer, we find, based on our review of Mr. Officer's testimony (Spectrum Exh. 7; Tr. 645-653), that his proposed role at the station is not managerial and thus warrants no integration credit. Specifically, his responsibilities include gathering ideas for and hosting a television show called "Youth Forum" and "making suggestions and selections of different programs" for inclusion in a show called "Family Viewing Hour." Tr. 645, 647. Decision-making authority will be retained by his superior, Mrs. Wilson. Tr. 647-48. When questioned by the ALJ concerning his role in putting together "Youth Forum," he responded that a "technician," not he, would coordinate the various people responsible for producing and getting the program ready to go on the air and that the producer would supervise the technicians. Tr. 649-50. Mr. Officer stated that he would not be the producer. Tr. 650, 653. Although his job description indicates that he would "see that the budget for the young adult programs are adhered to and that spending is controlled," Spectrum Ex. 7, at 4, he admitted at hearing that he would not actually be establishing the budget. Tr. 651. In short, Mr. Officer's role appears to be that of a typical broadcast employee with programming responsibilities, but the record is wholly devoid of any evidence that he will have a policymaking role or will perform in any managerial or supervisory capacity. Accordingly, no integration credit can be awarded Spectrum for Mr. Officer's proposed role. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 661, 51 RR 2d 383, 386 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (1983).

7. As to Minority's exception concerning the overlapping roles of Mrs. Wilson and Mr. Crawford, we find that, although their titles and some of their proposed tasks bear some similarity, they both nevertheless appear to have true managerial functions in areas of responsibility that are sufficiently distinct to merit the award of integration credit for each of them. See I.D., para. 71, n.7. As public affairs and community production director, Mrs. Wilson will devise the proposed station's overall public affairs policy and supervise its effort to ascertain the community's needs.

Spectrum Exh. 3, at 5; Tr. 520. In addition, she will host certain programs, advise the general manager concerning controversial issues of public importance, and schedule people for public affairs programs. Tr. 521, 524, 526. Finally, she will have overall responsibility for working with the Jeff Vander Lou Communications Resource Center, a community productions group in St. Louis, and will conceptualize programs to be aired. Tr. 521, 523. The record makes clear that a prime focus of her role will be in developing community public affairs programs with particular appeal to minorities and women. Tr. 522-25. Mr. Crawford, as producer of community-oriented programs, will perform some similar functions, including hosting certain programs, meeting with community groups, and working with the staff of Jeff Vander Lou Communications Resource Center. Spectrum Exh. 5, at 4-5. However, the inference is warranted from the record that, as an expert in the criminal justice system who has spent many years dealing with prison and parole matters, Mr. Crawford will be exercising managerial discretion in producing and developing locally-oriented station programs and views respecting the criminal justice system, political corruption, unemployment, and education. *Id.*, Tr. 562-63, 566-71, 574-77, 580, 582-83. He and Mrs. Wilson thus have different areas of primary focus, and the award of full integration credit for both of their proposed roles is therefore warranted. *See Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 511, 52 RR 2d 1210, 1214 (Rev. Bd. 1982), *rev. denied*, 55 RR 2d 23 (1983) (integration credit awarded for three separate roles of minority affairs director, women's affairs director, and community affairs director).[3]

8. In sum, Minority merits a slight preference over Spectrum for its 100% to 83.485% advantage in quantitative ownership integration which results from deducting Mr. Officer's 15.015% integration credit. This more than 16.5% difference is "clear" and cannot be overcome by qualitative factors. *See New Continental, supra*, 88 FCC 2d at 850, 50 RR 2d at 1133 (12.5% is a "clear quantitative difference"). Nevertheless, before reaching an overall integration conclusion we shall briefly address the applicants' qualitative enhancement factors for the benefit of reviewing authority, especially because our quantitative analysis has differed from the I.D.

9. *Qualitative Factors: Local Residence.* The ALJ found that Minority's Artis Talley, a 4% owner, is a civically-active resident of the proposed

[3] The evidence supporting Mr. Crawford's separate managerial role is inferential and barely passes the "preponderance of the evidence" test; however, Minority is already well ahead of Spectrum in terms of ownership integration. See paragraphs 8 and 15, *infra*. Rejection of credit for Mr. Crawford would lower Spectrum's integrated ownership to 60.735% compared to Minority's 100% and would correspondingly increase Minority's ownership integration preference from "slight" to "moderate." *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 817, 51 RR 2d 409, 421-22 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, released September 15, 1983.

community of license, East St. Louis, and its remaining stockholders (96%) live and participate in civic affairs in St. Louis, which is within the city-grade signal contour of the proposed station. On the other hand, the ALJ's findings indicate that Spectrum's Myrtle and Marion Officer (22.75% ownership between them) are civically-active East St. Louis residents, Thomas Hart (22.75%) will move to East St. Louis if Spectrum's application is granted, and its remaining stockholders, Wilson, Crawford, and Wyche (together 53%), are civically-active St. Louis residents. The ALJ preferred Spectrum because of "greater direct ties with East St. Louis . . . ." I.D., para. 72.

10. We disagree with the ALJ's analysis. First, since Spectrum's Marion Officer (15.015%) will not be integrated into a management role (see paragraph 6, *supra*), his local residence enhances its integration proposal to a slight degree only. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1911, (1965); *Merrimack Valley, supra*, 92 FCC 2d at 514, 52 RR 2d at 1216. Consequently, Spectrum has only a small advantage of 7.735% to 4% in actual East St. Louis residence of integrated owners, whereas Minority is more significantly ahead (96% to 60.735%) if service area residence, which closely follows in importance residence within the community of license, is added. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1263, 52 RR 2d 1063, 1066 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, No. 82-2513 (D.C. Cir. May 25, 1984); Note 4, *infra*. Second, when service area residence has occurred within a community contiguous to the proposed community of license, it has been treated as equal in importance to residence within the proposed community. *New Continental, supra*, 88 FCC 2d at 849 n.20, 50 RR 2d at 1132 n. 20. Therefore, in the case at bar, residence in St. Louis, which is separated only by a river from East St. Louis, may by reason of such proximity properly be counted as equal in significance to residence within East St. Louis itself. *See Amendment of Table of Assignments (East St. Louis, Illinois)*, 46 Fed. Reg 30090, published June 5, 1981. The rationality of such treatment is particularly strong in television cases such as this one, because television service is designed to serve large areas rather than small communities, and the fact that St. Louis and East St. Louis technically lie in different states is not contraindicative. *Cf. Cleveland Television Corp*, 91 FCC 2d 1129, 1137, 52 RR 2d 581, 587 (Rev. Bd. 1982) ("television service area for Section 307 (b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries' "), *rev. denied*, FCC 83-235, released May 18, 1983, *aff'd sub nom. Cleveland Television Corp.* v. *FCC*, No. 83-1659 (D.C. Cir. April 20, 1984).

11. Consequently, in the instant case, the determinative comparison of the applicants' local residence enhancement is between Minority's 96%

integrated East St. Louis and service area residence and Spectrum's 60.735%.[4] Spectrum's additional credit for Mr. Hart's (22.75%) proposed move to East St. Louis and his 1980-81 residence in St. Louis is very slight because short-term and proposed future local residence are not as valuable as long-time, actual local residence. *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910. And credit for Marion Officer and Mark Roberts is also very slight. See paragraph 10 and note 4, *supra*. Accordingly, we award Minority a moderate preference for local residence enhancement.

12. *Civic Participation.* The ALJ fully discussed the civic participation in community affairs of the applicants' principals. I.D., paras. 25-27, 30, 42, 44, 46, 49-50, 54. The integrated ownership of each applicant is well enhanced in this regard and no meaningful distinctions between them can be drawn. Accordingly, no preference for civic participation enhancement will be awarded. *See Merrimack Valley, supra*, 92 FCC 2d at 517, 52 RR 2d at 1218.

13. *Broadcast Experience.* This is a comparative factor of minor significance. *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910. The only principals in this proceeding with substantial broadcast experience are Minority's Artis Talley (4%), whose experience spans June 1972 to April 1978 and who has performed in a variety of roles, including program administrator, public affairs producer, and producer/director; and Spectrum's Frank Wyche (7.5%), who has been employed in broadcast sales since 1975 and has been a local sales manager since 1979. I.D., paras. 36, 43. Wyche has slightly longer broadcast experience, but Talley has served in a greater variety of broadcast roles. We find that the enhancements of these minor stockholders are essentially offsetting. *See North Carolina Radio Service, Inc.*, 92 FCC 2d 621, 623, 52 RR 2d 993, 994 (Rev. Bd. 1982). Similarly, in comparing the less extensive broadcast experiences of Minority's Steven and Michael Roberts (92%) and Spectrum's Thomas Hart (22.75%), enhancement credit is offsetting because Hart's experience is significantly greater but enhances a much smaller quantitative integration share. *See* I.D., paras. 24, 29, 55; *New Continental Broadcasting Co.*, _____ FCC 2d _____, 55 RR 2d 413, 415 (Rev. Bd. 1983). Therefore, no enhancement preference will be awarded for broadcast experience, the ALJ's grant of a slight preference to Spectrum

[4] The ALJ found, with regard to Minority's Mark Roberts (4%) that he was raised in the St. Louis area, moved to California in 1982, and recently returned to the St. Louis area (I.D., para. 34). In its reply brief, Spectrum points out that Roberts moved once again, on August 8, 1983, to Englewood, California. Nevertheless, we note that his current knowledge of the service area based on his long-time residence there and on his commitment to return there in case of a grant does enhance Minority's integration proposal slightly.

will be modified accordingly, and Minority's exception will be granted in part.

14. *Minority and Female Integrated Ownership.* Because all of the stockholders of both applicants are black, I.D., para. 74, and a majority of them will be integrated full time into broadcast managerial roles, both applicants enjoy significant minority enhancements. *See Horne Industries, Inc.*, 94 FCC 2d 815, 827-28, 54 RR 2d 249, 258-59 (Rev. Bd. 1983). However, because we have awarded Minority greater quantitative integration credit (see paragraph 8, *supra*), it also merits a slight minority enhancement preference. *New Continental, supra*, 55 RR 2d at 415. Similarly, while Minority has no female stockholders, Spectrum will integrate full time its 30.485% female ownership (Margaret Bush Wilson and Myrtle Officer) into management, which is sufficient under *Horne Industries, Inc., supra*, to yield a slight female ownership enhancement preference. *See San Joaquin Television Improvement Corp.*, ____ FCC 2d ____, 54 RR 2d 1206, 1214 (Rev. Bd. 1983).

15. *Integration Summary.* Minority's clear quantitative integration edge over Spectrum is qualitatively enhanced by a moderate local residence enhancement preference and a slight minority ownership enhancement preference. In addition, Minority's integration proposal is qualitatively strengthened because it will integrate a 46% owner, Steven Roberts, as general manager (whereas Spectrum does not propose any principal for this key post) and the general manager's position is the most important broadcast managerial position. *East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 172, 21 RR 2d 992, 996 (1971); *see also Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909-10; *Grand Broadcasting Co.*, 36 FCC 925, 930, 2 RR 2d 327, 339 (1964); *North Carolina Radio Service, supra*, 92 FCC 2d at 623, 52 RR 2d at 995 (moderate enhancement merit based, in part, on importance of general managerial position). On the other hand, Spectrum's qualitative enhancements have yielded only a slight female ownership preference, which is insufficient to outweigh Minority's preferences. Therefore, we conclude that Minority's ownership integration proposal is superior qualitatively as well as quantitatively to Spectrum's proposal and award it a slight overall integration preference.[5]

16. *Diversification of Control of the Mass Media.* We shall deny Minority's exception to the ALJ's determination not to award it a

[5] Even if Spectrum were accorded quantitative integration credit for Marion Officer and Minority no longer had a "clear" quantitative edge, Minority's qualitative enhancement preferences for local residence (reduced to a slight preference) and minority ownership (reduced to a very slight preference) would exceed Spectrum's slight female ownership enhancement preference, and Minority would still deserve a slight overall integration preference over Spectrum. *See Radio Jonesboro, Inc.*, ____ FCC 2d ____, 55 RR 2d 991, 996 (Rev. Bd. 1984).

diversification preference despite his finding that Spectrum's president and 22.75% owner, Margaret Bush Wilson, is: (1) a trustee of Washington University, the licensee of noncommercial broadcast Station KWUR-FM, St. Louis, Missouri; and (2) a director and president of *Crisis* magazine, which is a monthly publication of the National Association for the Advancement of Colored People (NAACP) that is distributed only to its membership. See I.D., paras. 21, 66-68. First, there is no record evidence that Mrs. Wilson, who has no ownership interest in KWUR-FM, participates in the management or operation of the station, and, thus, her role as trustee of Washington University, without more, "is simple too remote and attenuated to be given weight as a comparative factor in this case." *Waters Broadcasting Corp.*, 88 FCC 2d 1204, 1207, 50 RR 2d 1110, 1113 (Rev. Bd. 1981), *rev'd on other grounds but aff'd on this point*, 91 FCC 2d 1260, 1265, 52 RR 2d 1063, 1068 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC, supra; but cf. San Joaquin Television Improvement Corp., supra*, 54 RR 2d at 1209-10 (extensive involvement in noncommercial station by applicant's principals is weighted under diversification criterion). Second, we conclude, as did the ALJ, that as a monthly membership magazine of a private association (the NAACP), *Crisis* is "not proper for consideration under the diversification factor." *Loyola University*, 12 RR 1017, 1112 (1956), *rehearing denied*, 12 RR 1116a (1957), *aff'd sub nom. Noe* v. *FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 925 (1959). Finally, *Merrimack Valley, supra*, 92 FCC 2d at 517, 52 RR 2d at 1218, and *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 528-29, 35 RR 2d 1637, 1640-41 (Rev. Bd. 1976), do not hold, as Minority contends, that all monthly magazines are cognizable for diversification purposes. In those cases, although the Board noted that an applicant's principal held interests in newspapers and magazines, it nevertheless essentially considered only the newspaper interests in awarding diversification preferences. Also, the magazines involved in those cases do not appear to have been associated with or distributed to membership in private associations.

17. *Auxiliary Power.* Although Minority (Exh. 5) has proposed to use auxiliary power whereas Spectrum has not, the ALJ declined to award Minority a preference for this factor. I.D., para. 75. We grant Minority's exception and award it a slight auxiliary power preference based on our recent application of the Commission's *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966), to television cases. *San Joaquin Television, supra*, 54 RR 2d at 1214 and n.23.

18. *Comparative Coverage.* We deny Minority's exception to the ALJ's determination not to award it a comparative preference for proposing to serve 2,540,754 persons over 8,775 square miles compared to

Spectrum's proposed coverage of 2,502,868 persons over 7,183 sq. mi., I.D., paras. 56, 75. Except for a small area of 17.5 sq. mi. containing 873 persons who would receive a fifth television service, the differential area already has an abundance of service. I.D., para. 57. Accordingly, the ALJ properly applied *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647, 27 RR 2d 1379, 1387-88 (Rev. Bd. 1973) (very slight preference for coverage of 21% more population that is already well-served), and concluded that no preference is warranted.

19. *Carelessness and Misrepresentation Issues.* The ALJ specified two character issues against Spectrum. The first issue explored whether Spectrum was careless or willfully disregarded Commission application and filing requirements in preparing and filing its technical application. The ALJ found that Eddie Hogan-Bassey, who was then Spectrum's Vice President of Engineering, proposed Chief Engineer, and a 1.5% owner, and who had been hired specifically to prepare Spectrum's engineering proposal, made numerous errors in preparing technical exhibits to the application. Indeed, Mr. Hogan-Bassey confessed at hearing that he lacked FCC experience, made several mistakes and wrong technical assumptions and speculations, was careless, and took inadequate precautions. Although the applicants proposed the same transmitter site, with Spectrum proposing less than half of Minority's effective radiated power (ERP) and an antenna height only two feet higher than Minority's, Hogan-Bassey believed that both applicants would nevertheless have the same signal contours and incorporated Minority's contour maps into Spectrum's application. He stated in an affidavit that he had independently computed all engineering calculations but later explained at hearing that no calculations were made regarding the contour maps themselves — he assumed the contours would be the same. I.D., paras. 3-6. Thomas Hart, Spectrum's general counsel, an integrated principal, and the person primarily responsible for preparing the application, hired Hogan-Bassey based on the latter's educational background in engineering and technology and his references, although Hart knew that Hogan-Bassey had never before prepared an FCC application. In fact, Hogan-Bassey's only prior experience in television had been as a maintenance engineer. Mr. Hart knew of the proposed ERP difference between the two applications, but accepted as accurate Hogan-Bassey's representation and reassurances that the contours and service area of the two applications would be the same. I.D., paras. 7-9.

20. We depart from the ALJ's aggregation of the above evidence with that adduced pursuant to the separate misrepresentation issue and his

assessment of a combined moderate demerit.[6] See I.D., paras. 58-65. Like the ALJ, however, we find that no motive to conceal or deceive on the part of Spectrum has been shown or is otherwise evident and therefore exonerate it on the "willful disregard" charge. Spectrum did correct its engineering showing to cure the various defects, I.D., para. 59, and the errors were, by happenstance, nondecisional in this case (see paragraph 18, *supra).* However, we are persuaded that Spectrum demonstrated a disturbing pattern of carelessness in two respects. First, its then-principal, Mr. Hogan-Bassey, was by his own admission careless throughout in his preparation and oversight of Spectrum's engineering proposal, which is by its very nature a key document in the Commission's application process. *Cf. FBC, Inc.*, 95 FCC 2d 256, 55 RR 2d 1344 (Rev. Bd. 1983), *recon. denied,* 55 RR 2d 1377 (Rev. Bd. 1984) (applicant's comparative coverage proposal, which is determined by its technical proposal, can be of decisional importance). Second, Mr. Hart, who was in charge of the preparation of the application, had a duty either to select an engineer more qualified that Mr. Hogan-Bassey or to exercise closer supervision over one so inexperienced in Commission matters. He did neither, even though he had knowledge of both Mr. Hogan-Bassey's inexperience and the ERP difference in the applications. Therefore, again noting that Mr. Hogan-Bassey was Spectrum's proposed Chief Engineer and 1.5% stockholder at the time and that Mr. Hart was (and remains) its general counsel, a 22.75% owner, and its proposed news and editorial director, we shall assess Spectrum with a slight comparative demerit for its carelessness in preparing its technical proposal. *See generally, Merrimack Valley, supra,* 55 RR 2d at 25.

21. The second character issue was whether Spectrum misrepresented that its answers to interrogatories reflected information derived from its principals. Specifically, on October 4, 1982, Minority served interrogatories on Spectrum as part of its prehearing discovery, and in responding to these interrogatories, on October 25, 1982, Thomas Hart attached an affidavit which stated that he had prepared answers for Mr. Hogan-Bassey "in consultation with" him. He had, however, no conversation or

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[6] We also disagree with the ALJ's apparent determination that Spectrum's listing of Myrtle Officer as a director of WESL, Inc. in its application filing of January 27, 1982 was additional carelessness worthy of sanction because she was not officially elected as director until January 30, 1982 and prior thereto had merely acted in her husband's stead. See I.D., paras. 10-12, 63. Instead, we find that, although more complete information concerning Mrs. Officer's role at WESL should have been furnished, the information actually furnished was not substantially misleading; that this episode was isolated and not part of the carelessness pattern discussed above in text; and that no motive to deceive or conceal has been shown. In short, this matter is, at most, a "trivial reporting failure" unworthy of either exploration or sanction. *See Merrimack Valley, supra,* 55 RR 2d at 25.

other contact with Hogan-Bassey from September 23, 1982 until November 12, 1982, during which period the interrogatories were served on Mr. Hart. Hence, Mr. Hart's answers were based on pre-interrogatory consultations with Hogan-Bassey, and, unbeknownst to Mr. Hart, some of the answers he supplied concerning Hogan-Bassey's current employment, residence, and future plans — matters that directly relate to the standard comparative issue — were incorrect. I.D., paras. 13-15. Although, again, no motive to conceal or deceive concerning the correct Hogan-Bassey data has been shown, and here Spectrum promptly corrected the misinformation prior to detection, we nevertheless impose a slight comparative demerit on Spectrum for the ineptness evidenced in Hart's careless approach to an important duty, namely, providing accurate and full responses to interrogatories. *Cf. United Broadcasting Co., Inc. (WOOK(FM))*, 94 FCC 2d 938, 954 (Rev. Bd. 1983) (slight comparative demerit assessed under reporting issue that was tried essentially as an ineptness issue); *see generally, Merrimack Valley, supra*, 55 RR 2d at 25. In substituting two slight demerits for the single moderate demerit assessed by the ALJ, we express our overall conclusion under these character issues that Spectrum's demonstrated shortcomings were serious enough for some sanction but not sufficiently egregious to warrant a graver remedy. *Id.*

22. *Petition to Enlarge Issues.* Spectrum excepts to the ALJ's denial of its petition to enlarge issues, filed May 25, 1983, which sought the addition of an abuse of process issue against Minority. See Memorandum Opinion and Order, FCC 83M-2137, released June 30, 1983. In essence, Spectrum contends that Minority threatened and coerced Spectrum during settlement negotiations. Minority specifically denies these allegations and asserts that it negotiated in good faith and properly exercised the right to point out to Spectrum weaknesses in its application, and that Spectrum had ample opportunity to deliberate and discuss the matters raised with its counsel. We affirm the ALJ's refusal to add the requested issue for the reasons discussed fully in his ruling. In short, Spectrum has failed to make a substantial showing that Minority exceeded responsible settlement negotiation tactics and engaged in harassment or intimidation.[7] *See Barnes Enterprises*, 69 FCC 2d 1957, 1963-65, 44 RR 2d 1351, 1359-61 (Rev. Bd. 1978).

23. *Comparative Summary.* Having considered all decisionally significant exceptions, we affirm the ALJ's ultimate conclusion that a grant of Minority's application will best serve the public interest, convenience,

[7] The ALJ's Order also denied two petitions to enlarge issues filed by Minority, which alleged that Spectrum had misused the settlement process. In this regard the ALJ noted that it was not until its own conduct in the negotiations was brought into question that Spectrum made mention of the alleged misbehavior of Minority.

and necessity. Minority has received a slight ownership integration preference and a slight auxiliary power preference whereas Spectrum, which was awarded no ultimate preferences, has been assessed two slight comparative demerits under the specified "carelessness" and "misrepresentation" issues. Minority is clearly the comparatively superior applicant.

24. ACCORDINGLY, IT IS ORDERED, That the application of Minority Broadcasters of East St. Louis, Inc. (File No. BPCT-811208KG) for a construction permit for a new television station to operate on Channel 46 at East St. Louis, Illinois IS GRANTED, and the application of Spectrum Telecommunications Corporation (File No. BPCT-820127KJ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Minority Broadcasters of East St. Louis, Inc. East St. Louis, Illinois .	BC Docket No. 82-378 File No. BPCT-811208KG
Spectrum Telecommunications Corporation East St. Louis, Illinois	BC Docket No. 82-380 File No. BPCT-820127KJ
For a Television Construction Permit	

Appearances

William S. Reyner, Jr., *Carol A. Melton*, and *Timothy J. Dowling* on behalf of Minority Broadcasters of East St. Louis, Inc. and *Michael Finkelstein*, *William S. Andrews*, and *Carolyn G. Nussbaum* on behalf of Spectrum Telecommunications Corporation; and *Norman Goldstein* and *Charles E. Dziedzic* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: November 8, 1983; Released: November 16, 1983

1. By *Hearing Designation Order*, 47 Fed. Reg. 31958, July 23, 1982, the Commission by the Chief, Broadcast Bureau, designated for hearing the mutually exclusive applications of Minority Broadcasters of East St. Louis, Inc., East St. Louis 46 Broadcasters, Inc., Spectrum Telecommunications Corporation, and Mahogany Entertainment Television, Inc. to construct a new television facility at East St. Louis, Illinois.[1] The following issues remain to be considered in this decision:

1. To determine whether Spectrum Telecommunications Corporation in preparing and filing its technical application has exhibited carelessness and/or willful

[1] The applications of Mahogany Entertainment Television, Inc. and East St. Louis 46 Broadcasters were dismissed with prejudice. *Order* FCC 83M-1640, released May 17, 1983.

disregard of the Commission's application and filing requirements, and, in light of the evidence adduced, its effects on Spectrum's basic and/or comparative qualifications.

2. To determine whether Spectrum Telecommunications Corporation misrepresented that its answers to interrogatories reflected information derived from its principals and, if it did, to determine the effect its misrepresentation will have on the qualifying or comparative standing of Spectrum.[2]

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Written testimony was submitted on November 30, 1982, cross-examination was held on December 14, 1982 and recessed on December 15, 1982. Additional hearing sessions were held on May 3, 4, and 5, 1983. The record was closed on May 5, 1983. *Order*, FCC 83M-1516, released May 9, 1983. Proposed findings and conclusions of law were filed on July 15, 1983 by the Mass Media Bureau and on July 22, 1983 by Minority and Spectrum. Minority was directed to conform its findings to the Commission's rules and the regulations set in this proceeding (*Order*, FCC 83M-2572, released August 3, 1983) and on August 10, 1983 a regulation copy was filed by Minority. Reply findings were filed by Spectrum and Minority on August 5, 1983.

Findings of Fact

3. *Issue 1*: Spectrum retained Eddie Hogan-Bassey to prepare the engineering exhibits for its application. Sp. Exh. 10 at 2. In preparing the engineering Mr. Hogan-Bassey incorporated into Spectrum's application the contour map of Minority Broadcasters which depicted the Grade A, Grade B and City Grade contours of Minority Broadcasters rather than Spectrum's contours. Min. B. Exh. 9, Figure 20; Tr. 333. While Spectrum and Minority intend to transmit from the same tower, it proposes less than half the amount of effective radiated power of Minority (2168 kw ERP compared with 5000 kw ERP) and its antenna would be only two feet higher on the tower than Minority's. Tr. 297-99.

4. Mr. Hogan-Bassey stated in an affidavit that he had "independently computed all engineering calculations related to the preparation of Section V-C" and that his "independent calculations resulted in a grade B service contour that [he] believed was accurately reflected in the grade B service contour map contained in [Spectrum's] application." Min. B. Exh.

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[2] Issue 1 was designated on October 18, 1982 (*Memorandum Opinion and Order*, FCC 82M-3261, released October 20, 1982) and also on that date Minority's request to adduce comparative coverage and efficiency evidence was granted (¶10). Issued 2 was designated on April 12, 1983 (*Memorandum Opinion and Order*, FCC 83M-1237, released April 14, 1983).

12. On cross-examination, however, he admitted that he did not make calculations with respect to the contour map (Tr. 311, 325, 333, 369-70) but had simply "speculated" on Spectrum's placement of its antenna two feet higher on the tower than Minority Broadcasters' antenna (Tr. 397) and had assumed that the contours would be "nearly the same." Tr. 309, 322-23. He also testified that he made no independent calculations on the terrain profiles depicted in Figures 15-19 of the Spectrum application. Min. B. Exh. 10, Tr. 319-20.

5. Mr. Hogan-Bassey testified that he "didn't know much about [the] FCC, that you have to be exact," and that he had "us[ed] the analogy we used in writing technical papers, near the same." Tr. 324. Mr. Hogan-Bassey stated further that the tolerance or difference between the coverage of the two applicants was "about 25 percent." Tr. 329. Mr. Hogan-Bassey admitted that he also had been "careless" in incorrectly stating that a grant of the application to Spectrum would be a major environmental action (Tr. 366-67); that he incorrectly identified the type of antenna proposed by Spectrum as a "python" rather than the correct term "pylon" antenna (Tr. 371); that he exhibited "carelessness" in not computing the height of the site above mean sea level as required in Section V-C (Tr. 369); and that he incorrectly assumed that Spectrum had a higher gain antenna than did Minority Broadcasters. Tr. 396-97. Mr. Hogan-Bassey admitted repeatedly at the hearing that he had made mistakes and had been careless in the preparation of Spectrum's engineering (Tr. 310, 324, 367-69, 371, 397, 402, 420), stating that: "I should have taken precautions but I think there was a bit of carelessness there. I admit it, and I will not do it again. I think you learn from past mistakes and I learned from this." Tr. 420. The engineering portion of the Spectrum application was amended to correct all three contours, the responses regarding whether a grant to Spectrum would be a major environmental action and each of the computations in distance to the contours along each of the nine radials. Tr. 856-57.

6. Mr. Hogan-Bassey testified that he had never prepared an FCC Form 301 before and Thomas Hart, Spectrum's General Counsel, testified that he knew this fact when he hired Mr. Hogan-Bassey. Sp. Exh. 10 at 3; Tr. 840. Mr. Hogan-Bassey stated that he worked for approximately two months, five days a week for three to four hours per day and was paid a total of $500.00 for his work. Tr. 411. Mr. Hart testified that Mr. Hogan-Bassey also was given a 1.5 percent equity interest in Spectrum, although that interest was returned when he withdrew from the Spectrum application. Tr. 838-39. Mr. Hogan-Bassey stated that he "was disadvantaged" in preparing the engineering in relation to the money he was paid and the fact that he "couldn't go to St. Louis to look at the site." Tr. 408. Mr. Hart testified that he had received estimates of between $1,500.00 and

$4,500.00 from other engineers that he had consulted prior to Mr. Hogan-Bassey. Tr. 837.

7. Mr. Hogan-Bassey had never met any Spectrum principal other than Mr. Hart until immediately prior to the reconvened hearing on May 3, 1983. Tr. 287. Mr. Hart testified that he hired Mr. Hogan-Bassey the day after he first met him. Tr. 835. Mr. Hogan-Bassey's only job in television was as a maintenance engineer at WABC-TV. Although Mr. Hart testified that he believed Mr. Hogan-Bassey "was competent" at the time he hired him (Sp. Exh. 10 at 2), he admitted at the hearing that now "[he did not] think that he was qualified to prepare [the engineering] unsupervised." Tr. 783. Spectrum had hired Mr. Hogan-Bassey because of his background and experience in engineering and technology, including graduate study at Purdue and Massachusetts Institute of Technology; he was highly recommended to Mr. Hart by two individuals who were acquainted with Mr. Hogan-Bassey's work in the communications field. Sp. Exh. 10 at 2, Tr. 841. Mr. Hogan-Bassey was also willing to make a full-time commitment to the station. Tr. 781. The fact that Mr. Hogan-Bassey is black also entered into the decision because Spectrum wanted to be a minority effort.

8. Mr. Hart testified that he was the person primarily responsible for preparing the Spectrum application. Tr. 835. Mr. Hart testified that he had assisted in the preparation of an FCC 301 application in his work as a law clerk in 1979 and 1980. Sp. Exh. 10 at 3. Mr. Hart stated that even though he knew of the power difference between the two applicants he "accepted [Mr. Hogan-Bassey's] representations as being accurate" that the contours and service areas would be the same. Tr. 883. Mr. Hart testified that he never reviewed any of Mr. Hogan-Bassey's work papers. Tr. 851. He testified that in his review of the application prior to its filing he only "lea[f]ed through the engineering sections." Tr. 835.

9. In completing Spectrum's application, Mr. Hogan-Bassey left the name of Minority's engineers on the contour map. Sp. Exh. 11 at 3. However, where Minority's exhibits were altered, or where Mr. Hogan-Bassey believed it was necessary to avoid confusion, the Minority label was deleted. *Id.* Mr. Hogan-Bassey testified that Mr. Hart told him he could use the materials from Minority's application and Mr. Hart stated that he and Mr. Hogan-Bassey jointly decided to cover over the name of Minority's engineer on seven of Spectrum's maps. Tr. 297, 863. Mr. Hart specifically questioned Mr. Hogan-Bassey as to the accuracy of the Minority graphs, and was reassured by Mr. Hogan-Bassey that their use in Spectrum's application was appropriate. Tr. 848, 851, 866, 868. At the time the application was filed, neither Mr. Hogan-Bassey, nor Mr. Hart, who had final responsibility for the remainder of the application, was aware of any inaccuracies. Tr. 794, 820-21.

Myrtle Officer's Interest in WESL, Inc.

10. In Spectrum's application, which was filed on January 27, 1982, Myrtle Officer disclosed that she was a director of WESL, Inc., although she was not officially elected as a director until January 30, 1982. Sp. Exh. 6 at 3.

11. Myrtle Officer and her husband, Marion Officer, Sr., jointly own 15 shares (.8%) of WESL, Inc., licensee of station WESL in East St. Louis. *Id.* Marion Officer, Sr. was elected to the Board of WESL, Inc. in 1980. *Id.* On several occasions, Mr. Officer sent his wife in his stead to vote by proxy or observe the proceedings. *Id.*, Tr. 701. Mr. Officer's term on the Board was to expire in January, 1982, and he had planned to resign. Sp. Exh. 6 at 3. Myrtle Officer had been notified that she would be elected to replace him. Sp. Exh. 6 at 3-4.

12. Accordingly, when Mr. Hart, in completing the Spectrum application inquired as to Ms. Officer's involvement with WESL, Inc., she referred to herself as a director. Sp. Exh. 6 at 3-4. Ms. Officer gave the information to Mr. Hart in order to fully inform the Commission of her broadcast interests and to be "truthful." Tr. 703, 707-08.

13. *Issue 2*: Minority Broadcasters served interrogatories on Spectrum on October 4, 1982 and Spectrum's responses were served on October 25, 1982. Tr. 277, 763. In an affidavit attached to the interrogatory responses, Mr. Hart stated that he had prepared the answers for Mr. Hogan-Bassey "in consultation with" him. At the hearing, Mr. Hart admitted that he did not talk to Eddie Hogan-Bassey from September 23, 1982 until November 12, 1982. Tr. 810. Mr. Hogan-Bassey also testified that he had no contact with Mr. Hart between these dates. Tr. 278-79

14. Mr. Hart stated that he answered the interrogatories for Mr. Hogan-Bassey and that he "knew a lot about him and felt very comfortable in answering those interrogatories based on the consultations that we had just recently had on September 23rd, as well as other conversations and meetings that we had had before." Tr. 766. Mr. Hart, however, admitted that he could not have known at the time of the September 23rd meeting what questions Minority Broadcasters would ask in its interrogatories. Tr. 816, 824. Mr. Hart testified that he mailed copies of the interrogatories to all of the Spectrum principals, including Mr. Hogan-Bassey. Tr. 764. In order to prepare responses for all of the principals other than Mr. Hart and Mr. Hogan-Bassey, Spectrum's counsel travelled to St. Louis to meet personally with those individuals. Tr. 763-64. Mr. Hart also testified that he later telephoned two of the principals in St. Louis to check on certain information to be included in the answers. Tr. 765.

15. Mr. Hart testified that he did not attempt to contact Mr. Hogan-Bassey until "the latter part of October" following Minority Broadcast-

ers' service of its deposition notice to Mr. Hogan-Bassey. Tr. 772. However, each item of information required by the interrogatories — sex, race, current and future residence, integration information including current employment, business interests, experience and civic activities, and media interests — had been the subject of prior discussion between Mr. Hart and Mr. Hogan-Bassey. Tr. 234-60, 766. Mr. Hogan-Bassey had accepted an offer of employment with the United States Government and moved to California sometime in October, a fact unknown to Mr. Hart at the time. Tr. 260-62. Therefore, answers provided to the interrogatories regarding Mr. Hogan-Bassey's current employment, residence and future plans were incorrect. Tr. 238, 285, 810-811, 812, 818-19.

16. *Issue 3: Comparative Differences*: Spectrum Telecommunications Corporation is an Illinois Corporation. Sp. Exh. 1 at 1. The voting interest and corporate office of each shareholder is as follows (Tr. 425-26; Sp. Exh. 1 at 1):[3]

Shareholder	*Interest*	*Office*
Margaret Bush Wilson	22.75%	President and Chairman
Curtis C. Crawford	22.75%	Sr. Vice President
Thomas A. Hart, Jr.	22.75%	Secretary and General Counsel
Marion E. Officer, Jr.	15.015%	---
Myrtle B. Officer	7.735%	Treasurer
Frank L. Wyche	7.5%	Administrative Vice President

17. On July 12, 1983, Spectrum filed a Petition for Leave to Amend its Application to reflect that it had formed Spectrum Telecommunications Associates, an Illinois limited partnership comprised of Spectrum as the sole general partner with a 75% equity interest, and Astroline Company, a Massachusetts limited partnership, as the sole limited partner with a 25% equity interest. All of the Spectrum shareholders, except Marion E. Officer, Jr., are members of the Board of Directors, of which Margaret Bush Wilson is the Chairman. Sp. Exh. 1 at 1.

18. Minority is a Delaware Corporation. Min. B. Exh. 1. The voting interest and office of each shareholder is as follows:

Shareholder	*Interest*	*Director*	*Office*
Steven C. Roberts	46%	Yes	President
Michael V. Roberts	46%	Yes	Secretary/Treasurer
Mark W. Roberts	4%	Yes	---
Artis Talley, Jr.	4%	Yes	---

19. In an *Order* released May 17, 1983 (FCC 83M-1640), a settlement agreement was approved between Minority and East St. Louis 46 Broadcasters, Inc. whereby if Minority is granted the construction permit

[3] Eddie Hogan-Bassey was formerly a 1.5% shareholder but has returned his shares to the corporation and resigned as a principal, Director and Vice President for Engineering of Spectrum. Tr. 762.

for the station, a new limited partnership to be known as Venture Communications, Ltd. will be formed. Tr. 916. Minority will become the sole general partner with a 75% equity interest and East St. Louis 46 Broadcasters, Inc. will be the sole limited partner with a 25% equity interest.

Diversification of Media

20. Myrtle B. Officer has served as a director of WESL, Inc., licensee of Station WESL-AM, East St. Louis, Illinois, since January 30, 1982. She and her husband jointly own fifteen shares (.8%) in WESL, Inc. Sp. Exh. 1 at 1. The Officers intend to divest themselves of the stock and resign from the Board if Spectrum is granted the construction permit. Sp. Exh. 1 at 1.

21. Margaret Bush Wilson serves on the Board of Trustees of Washington University, which has a license to operate KWUR-FM. Tr. 426. Ms. Wilson also serves on the Board of Directors and is President of the Board of *Crisis* magazine. Sp. Exh. 3 at 2. *Crisis* magazine is published by a wholly-owned subsidiary of the NAACP Tr. 468. The circulation of the magazine is limited to members of the NAACP and is subsidized with membership fees from the NAACP. The magazine began publication in 1910 and its national circulation is 200,000. *Id.*, Tr. 470-71. No other principal of Spectrum or Astroline Company has an ownership interest in any other mass media. Sp. Exh. 1 at 1.

Integration Proposal

22. Minority has proposed to integrate all of its principals into the station. Steven Roberts will serve as the General Manager; Michael Roberts as Sales Manager; Mark Roberts as Director of Public Affairs; and Artis Talley, Jr. as Operations Manager. Min. B. Exh. 3 at 5, 14, 21, 23. All of the Minority principals are black men. Steven, Michael and Mark Roberts are brothers and Artis Talley, Jr. is their cousin.

23. Steven, Michael and Mark Roberts live in St. Louis, Missouri and do not intend to move to East St. Louis, Illinois. Tr. 115, 149, 155. Artis Talley, Jr., a 4% stockholder is a resident of East St. Louis, where he has lived since 1978. Min. B. Exh. 3 at 23, 28.

24. Steven Roberts, the proposed General Manager, worked for two non-commercial college FM radio stations, while attending school, as a music and program director and as a disc jockey. Min. B. Exh. 3 at 7-8.

25. Steven Roberts is a politician and has been involved in a number of civic and community organizations in the city of St. Louis. Min. B. Exh. 3 at 10-11. Since 1979, Steven Roberts has served as an elected member of the Board of Alderman of the city of St. Louis. Min. B. Exh. 3 at 8-9. Steven Roberts also serves as Chairman of the Aldermanic Black Caucus. Min. B. Exh. 3 at 9, Tr. 140-41.

26. Steven Roberts has served as a Director on the Board of Nursery Foundation of St. Louis (1978-1982); as a member of Optimist International (1977-1979); as a Director of the Human Development Center (1977-1979); as a trustee of the St. Louis Art Museum (1977-1979); as a Director of the Conference on Education (1979-1982); and on the St. Louis Kiel Auditorium Commission (1979-1982), and a participant in the St. Louis Leadership Program. Min. B. Exh. 3 at 10-11.

27. Presently, Steven Roberts is a member of the Penrose Park Neighborhood Association, the St. Louis Community Development Commission, the Auxiliary Board of the Malcolm Bliss Mental Health Center, the All Saints Episcopal Church, and the American Cancer Society. Min. B. Exh. 3 at 11. All of these organizations are located in, or meet within, the city of St. Louis. Tr. 132-38.

28. Steven Roberts is part-owner and the Executive Vice-President of Roberts, Roberts and Associates, a consulting firm he founded with his brother Michael in 1974. Tr. 141-42; Min. B. Exh. 3 at 9. If the construction permit is granted, Roberts, Roberts and Associates intends to liquidate. Tr. 145. Steven Roberts also has an interest in Kingsway Center Partnership, owns real estate in St. Louis, and is affiliated with a local law firm, although he does not presently practice law. Tr. 146, 148.

29. Michael Roberts is the proposed Sales Manager of the station. Min. B. Exh. 3 at 14, 20. While a college student, Michael Roberts was involved with a college non-commercial Am and FM radio station, KCLC, as a part of his course of study. Tr. 59, The AM station coverage was limited to the university Tr. 60. Also while a college student, Michael Roberts served as a student intern at KMOX-TV, one day a week for three months. Tr. 61. He has never sold television air time. Tr. 115.

30. Michael Roberts is also a politician and has been involved in various community activities in St. Louis, including Optimist International (1980); Convention Center Commission (1977-1979); Land Reutilization Authority Commission (1976-1977); YMCA Jr. Kindergarten Board of Advisors (1976-1977); Int'l Institute of Metropolitan St. Louis; and committees of the National League of Cities (1978-1981). Michael Roberts currently is a member of the St. Louis Advertising Club, Downtown, Inc., the Kiel Auditorium Board, Auxiliary Board of Malcolm Bliss Mental Health Center, Board of Advisors of First Citizens' Credit Union Board; Columbia Community School Board, and the Yeatman Community Development Corporation Board. Min. B. Exh. 3 at 17-18. None of these organizations is located in, or meets within, the city of East St. Louis. Tr. 68-69.

31. In 1977, Michael Roberts was elected to the City of St. Louis Board of Aldermen from the 19th Ward. Min. B. Exh. 3 at 18. Michael Roberts

does not intend to resign his position on the Board, which occupies three to five hours per week of his time. Min. B. Exh. 3 at 19, Tr. 117-18.

32. Currently, Michael Roberts spends 40-50 hours per week as President of Roberts, Roberts and Associates. Tr. 100. Michael Roberts is also a partner in Kingsway Center Partnership and he owns real estate in St. Louis. Tr. 104.

33. Mark Roberts, the youngest of the Roberts brothers, will be the Public Affairs Director of the station and will be responsible for community relations and ascertaining the needs of the community. Min. B. Exh. 3 at 23, Tr. 152.

34. Mark Roberts was raised in the St. Louis area. Min. B. Exh. 3 at 21. He moved to California in 1982 and recently returned to the the St. Louis area, but he has not yet decided what type of employment to seek in St. Louis. Tr. 155-56.

35. Artis Talley, Jr. will be Operations Manager for the station. As Operations Manager, Mr. Talley will be responsible for supervising the technical engineering aspects of the station and assisting in the daily management of the station's operations. Min. B. Exh. 3 at 31, Tr. 161-62.

36. Mr. Talley worked during college at the radio and television stations of Southern Illinois University, where he produced a radio talk show and worked as an Assistant Producer. Min. B. Exh. 3 at 25-26. After college, Mr. Talley worked for Kaiser Broadcasting Company from June, 1972 to April, 1973, where he assisted in the preparation of a transfer application for WFLD-TV in Chicago and worked at Kaiser's station in Southfield, Michigan. Min. B. Exh. 3 at 26. In April, 1973, Mr. Talley was transferred to WKBD-TV, in Southfield, Michigan where he was, successively, a Program Administrator, a Public Affairs Producer, and a Producer/Director. Min. B. Exh. 3 at 26. From March, 1976 until April, 1978, Mr. Talley was employed by KYW-TV in Philadelphia. Min. B. Exh. 3 at 27. Mr. Talley works in the office of the Mayor of the City of East St. Louis. Min. B. Exh. 3 at 29. From July, 1979 until October, 1982, Mr. Talley was the Cable Information Officer for East St. Louis, coordinating the city's efforts to obtain a cable television franchise. Min. B. Exh. 3 at 29. Since October, 1980, Mr. Talley has served as an Executive Assistant to the Mayor. Min. B. Exh. 3 at 29-30.

37. Mr. Talley is a member of the Mayor's Task Force on Arson Prevention, an alternate member of the East St. Louis Economic Development Commission and a member of the Association of Black Journalists of St. Louis. Min. B. Exh. 3 at 31.

38. Spectrum intends to integrate all of its shareholders into full-time management of the station. Frank L. Wyche will be Sales Manager of the station; Margaret Bush Wilson will be Public Affairs and Community

Production Director[4] and Curtis Crawford will be a Producer of community-oriented programs. Thomas A. Hart will be the News and Editorial Director, Myrtle Officer will be the Business Manager and Public Relations Director, and Marion E. Officer, Jr. will be a Coordinator of Young Adults and Children's Programs. Sp. Exhs. 3-8.

39. All of the Spectrum principals are black. In addition, Margaret Bush Wilson and Myrtle Officer are women. Myrtle Officer is Marion Officer, Jr.'s mother. None of the other Spectrum principals are related.

40. Marion Officer, Jr. and Myrtle Officer are long-time residents of East St. Louis,Illinois. Sp. Exh. 6 at 1, Sp. Exh. 7 at 1. Curtis Crawford was raised and educated in the public schools in East St. Louis. Sp. Exh. 5 at 1. Margaret Bush Wilson, Frank Wyche and Curtis Crawford are currently St. Louis residents. Sp. Exh. 3 at 1, Sp. Exh. 4 at 1, Sp. Exh. 5 at 1. Thomas Hart, Jr. has lived in St. Louis but currently resides in Washington, D. C., and intends to live in East St. Louis if Spectrum is granted the construction permit. Sp. Exh. 8 at 1.

41. Margaret Bush Wilson will be the Public Affairs and Community Production Director of the station, and will develop the overall public affairs policy of the station, including ascertaining the public needs, hosting public affairs programs, and coordinating all aspects of public affairs programming. Sp. Exh. 3 at 5-6.

42. Ms. Wilson is Chairman of the Board of the National Association for the Advancement of Colored People ("NAACP"), and has been an active member of its St. Louis branch. Sp. Exh. 3 at 2. Ms. Wilson is a director of the Monsanto Company, and a Trustee of Washington University and Webster University, which are in St. Louis. Sp. Exh. 3 at 1-2. Ms. Wilson is also President of the St. Louis Committee for Fair Representation, and a member of the St. Louis chapter of the Alpha Kappa Alpha Sorority and the St. Louis Chapter of Links. Sp. Exh. 3 at 3. She was a member of the Land Reutilization Authority of St. Louis, and Chairman of its Board in 1979. Sp. Exh. 3 at 3.

43. Frank Wyche will be the station's Sales Manager. Mr. Wyche is presently employed by KSDK-TV, the NBC affiliate in St. Louis, as the local Sales Manager, a position he has held since 1979. Sp. Exh. 4 at 1. He supervises eight Account Executives, establishes the annual budget goals, and makes sales calls through the area, including the city of East

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[4] Minority urges that Ms. Wilson will not be available to work 40 hours per week because of her law practice and her job as a member of a number of corporate boards. However, Ms. Wilson's testimony indicates that while she now works as much as 25 hours per week (primarily on weekends) on her law practice, she would reduce her time to six or eight hours per week. Tr. 484-89. Her membership on the various corporate boards does not appear significant.

St. Louis. Sp. Exh. 4 at 1-2. Mr. Wyche was an Account Executive with KSDK-TV from 1975 until 1979. Sp. Exh. 4 at 1.

44. Mr. Wyche is a fund-raiser with the St. Louis Boy Scout Council and has been a District Chairman of that organization. Tr. 611-612. He is a member of the Downtown Optimist Club of St. Louis and a member and former board member of the Advertising Club of St. Louis. Sp. Exh. 4 at 2-3.

45. Curtis Crawford will be the producer of community-oriented programs at the station, where he will develop and supervise local programming and production targeted to the community and assist in the development of programming schedules. Sp. Exh. 5 at 4.

46. Mr. Crawford is a practicing attorney specializing in criminal law in St. Louis. Sp. Exh. 5 at 1. Mr. Crawford is on the Board of Directors of Dismas House and the Magdala Foundation in St. Louis, and is a long time member of the St. Louis chapter of the Omega Psi Phi Fraternity. Sp. Exh. 5 at 2. From 1979-1981, he was a member of the board of the Union-Sarah Community Corporation of St. Louis. Sp. Exh. 5 at 2. In 1968, he was the Republican Candidate for the United States House of Representatives, and a St. Louis delegate to the 1980 Republican National Convention. Sp. Exh. 5 at 2. In 1981, Mr. Crawford was appointed to the Board of Election Commissioners for the City of St. Louis. Sp. Exh. 5 at 2.

47. Myrtle Officer will be the station's Business Manager and Public Relations Director. Sp. Exh. 6 at 5. Her responsibilities will include supervising the daily business decisions of the station, working with the press and the East St. Louis community to obtain support, and ascertain its needs. Sp. Exh. 6 at 5-6.

48. Ms. Officer is the co-owner and Secretary/Treasurer of the Officer Funeral Home in East St. Louis and part owner and Manager of Officer Ambulance Service in East St. Louis. Sp. Exh. 6 at 1. Ms. Officer also owns rental property in East St. Louis and St. Louis. Sp. Exh. 6 at 1.

49. Ms. Officer is a Director of Community Hospital, Inc., on the Citizens Advisory Board of the Union Bank, and a Founder and President of the East St. Louis Civic Guild. Sp. Exh. 6 at 1-2. All of these organizations are located in East St. Louis. She is a member of the Board of Directors of the Urban League of Metropolitan St. Louis. Sp. Exh. 6 at 2. She has also been a participating employer in the vocational training program for District #189 in East St. Louis and was a member of the Illinois Advisory Committee of the United States Commission on Civil Rights. Sp. Exh. 6 at 2.

50. Ms. Officer has received a number of local honors and awards including: East St. Louis Department of Special Education, Vocational Training Program (1981); Gamma Epsilon Chapter of Gamma Phi Delta Sorority, Inc., "Appreciation for Outstanding Civic and Community

Service" (1980); Illinois State Senate and House of Representatives, Certificate of Recognition (1979); St. Louis Globe Democrat Newspaper, "Woman of Achievement for Civic Betterment" (1979); Belles Clubs, "Mom Salute" for Mother of the Year (1977); Pro-8 Social and Civic Club, "Woman of the Year" (1973); Urban League, "Volunteer Service Award" (1973); East St. Louis Urban League Guild, Founder's Award (1971); East St. Louis Monitor Newspaper, "Outstanding Woman in Business" (1970). Sp. Exh. 6 at 2.

51. Marion Officer, Jr. will be the Coordinator of Young Adults and Children's Programs. Sp. Exh. 7 at 4. His responsibilities will include establishing educational programming, coordinating and hosting young adult and children's programs and organizing programs to present the youth viewpoint, and reporting on events of concern to local youth. Sp. Exh. 7 at 4. Mr. Officer attended public school in East St. Louis and is currently the Managing Director of the Officer Ambulance Service. Sp. Exh. 7 at 1.

52. Mr. Officer has been active in volunteer groups working with children and young adults in East St. Louis and is a member of the Kappa Alpha Psi Fraternity in East St. Louis, the East St. Louis NAACP, the East St. Louis Jaycees, the Greater New Hope Baptist Church and the Masonic Lodge in East St. Louis. Sp. Exh. 7 at 1. Mr. Officer is also an active alumnus of Assumption High School in East St. Louis, assisting in career counseling. Tr. 638-39.

53. Thomas Hart, Jr. will be the News and Editorial Director of the station. Sp. Exh. 8 at 5. His responsibilities will include directing an evening newscast, supervising the news and editorial staff, and producing news documentaries and news reports on local topics. Sp. Exh. 8 at 5.

54. Thomas Hart, Jr. previously lived in St. Louis where he was a member of the local NAACP, and the Committee for Fair Representation. Sp. Exh. 8 at 3. Mr. Hart is currently a practicing attorney in Washington, D. C. Sp. Exh. 8 at 1. He will resign his current position and move to East St. Louis if Spectrum is granted the construction permit.

55. During college, Mr. Hart worked part-time for three years for commercial radio station WBRU-FM in Providence, Rhode Island, as an announcer, news reporter and production assistant. Sp. Exh. 8 at 2. Mr. Hart also worked at WGTB-FM in Washington, D. C. as a news reporter and announcer during two summers. Sp. Exh. 8 at 2. For several months in 1975-76, Mr. Hart was a news announcer, reporter and production assistant for WCLK-FM in Atlanta, Georgia. Sp. Exh. 8 at 2. During 1977, Mr. Hart worked at WPRO-AM/FM in Providence, Rhode Island in their news and sales departments. Sp. Exh. 8 at 2. Since 1976, Mr. Hart has been a reporter for the National Black Network, and in 1982 he became the Supreme Court reporter for the Sheridan Broadcasting Network. Sp.

Exh. 8 at 2. Mr. Hart also produced a nationally syndicated radio series in 1978 and was a guest correspondent in 1982 for a nationally syndicated television news program. Sp. Exh. 8 at 2.

Comparative Coverage

56. Both Spectrum and Minority propose the same site with substantially the same antenna height above average terrain. Min. B. Exh. 4 at 2. The difference in proposed coverage of Minority and Spectrum is as follows:

Applicant	*Population*	*Area*
Minority	2,540,754	8,775
Spectrum	2,502,868	7,183

Min. B. Exh. 4 at 4

57. The minimum number of existing services within the proposed Grade B contour of Minority is four. Min. B. Exh. 4 at 3. Minority would propose a fifth service in an area of 17.5 square miles with a 1980 population of 873 persons. *Id.*

Conclusions of Law

58. In addition to the basic comparative issue there are two issues about Spectrum's filing of information in its application and responding to discovery. Spectrum's engineer, Eddie Hogan-Bassey, was hired to prepare Spectrum's engineering because he would also work at the station. As compensation he was given $500 and a 1.5 percent interest in the applicant. Spectrum's engineering application prepared by Mr. Hogan-Bassey designates the same antenna tower as Minority; in fact, Spectrum in most respects merely submitted Minority's earlier filed engineering application.[5] Mr. Hogan-Bassey, however, had proposed effective radiated power for Spectrum that was substantially less than the power proposed by Minority (2168 kw ERP as compared to 5000 kw ERP) and, therefore, his use of Minority's contour maps gave an inaccurate picture of Spectrum's coverage. Initially, when Minority raised the issue, Mr. Hogan-Bassey responded in an affidavit that he had independently calculated the contours and that he believed the service contours were accurately reflected on the maps used. At the hearing, however, he explained that he had simply speculated that the contours would be nearly the same and he had not independently calculated Spectrum's proposed coverage.

59. Other parts of the engineering application were also inaccurate and these mistakes, while they do not exhibit dishonesty, do exhibit

[5] Minority has argued throughout the proceeding that the use of its engineering was illegal but that argument was rejected here as it has been by the Commission in other cases. *See Roanoke Christian Broadcasting*, FCC 83-441, released September 27, 1983.

carelessness. In fact, Mr. Hogan-Bassey admits that he was careless, unprepared to undertake the task alone, and would not do it again. It was Thomas Hart, Spectrum's General Counsel and a principal, who was primarily responsible for filing Spectrum's application. He also suggested to Mr. Hogan-Bassey that he use Minority's engineering. While Mr. Hart reviewed Mr. Hogan-Bassey's work before filing it, his review could only have been very casual since he did not notice any of the errors. In the end, Spectrum did not take steps to correct its engineering until after Minority pointed it out. While it then filed a curative amendment, it too required reformation before Spectrum satisfactorily complied with the Commission's rules.

60. In addition, when Spectrum provided information about Mr. Hogan-Bassey to Minority in response to interrogatories, it represented that the answers had been provided in consultation with Mr. Hogan-Bassey. As it turns out, Mr. Hart, who was ultimately responsible for preparing the answers, did not consult with Mr. Hogan-Bassey about the interrogatories but instead relied on his knowledge of Mr. Hogan-Bassey. This resulted in Minority being told by Spectrum that Mr. Hogan-Bassey lived and worked in Massachusetts when he had moved to California and taken new employment. Spectrum's incorrect statement about the reliability of answers is more troublesome than the inaccurate answers, since the correct answers were soon discovered by Minority when Mr. Hogan-Bassey was deposed. In addition, information about Mr. Hogan-Bassey's comparative standing became less significant, when shortly thereafter Mr. Hogan-Bassey withdrew from participation in Spectrum's application.

61. Spectrum also reported in the application that Myrtle Officer, a principal and Treasurer, was a Director of WESL, Inc., licensee of an East St. Louis broadcast station. In fact, it was not until three days after the application was filed that she became a Director. Although the application form requests designation of when and how long an interest or position is held, Spectrum provided the required information for all interests but this one, and, as it happens, it was an interest which required particular explanation in order to be understood.

62. Minority suggests that Spectrum had a motive to misrepresent Ms. Officer's interest, which arose from Spectrum's desire to claim broadcast experience for Ms. Officer. But the incident does not support such a serious inference. Ms. Officer's connection with the station would not qualify her as working in broadcasting. The incident appears on the fully developed facts to amount to no more than an inept attempt at reporting all relevant information.

63. Mr. Hart did not provide complete information about Ms. Officer's broadcast interest and the interrogatory answers he certified as having been given after consultation with Mr. Hogan-Bassey were not. In each

case the information was relevant to the comparative issue. The Commission depends on the accuracy of the information provided in the application and there can be no effective discovery process without the parties exercising scrupulous care and good faith in answering questions posed. In addition, Mr. Hart and Mr. Hogan-Bassey, both Spectrum principals, did not provide accurate engineering information. Moreover, when faced with obviously inaccurate projected contours, Mr. Hogan-Bassey stated under oath that he had computed the contours and arrived at the contours submitted, when he had not. Mr. Hart, who is still proposed for an important position in the station management, did little to review what Mr. Hogan-Bassey had prepared, although the errors would have been obvious to even the most inexperienced applicant.

64. In Spectrum's favor is the fact that Mr. Hogan-Bassey is no longer a principal and that it appears, at least at the outset, that Spectrum could reasonably have relied on Mr. Hogan-Bassey to do what he represented. But once the work was finished and Mr. Hart, Spectrum's experienced General Counsel and principal, took over reviewing the application before filing, little was done to insure accuracy even though the errors would have been readily apparent.[6] Mr. Hart could have, with care, noticed that the contours were the same although the power chosen was different. He might also have noticed that the tower site could not present a major environmental action when an existing tower would be used. Significantly, even after it was apparent that Mr. Hogan-Bassey's work was probably not what he represented, Spectrum continued to trust Mr. Hogan-Bassey when it submitted his self admitted untruthful affidavit about having made independent calculations of the contours. Then, when Mr. Hogan-Bassey did not respond to interrogatories, Mr. Hart supplied answers for him at the very time when he should have been most wary about doing so.

65. These incidents raise questions about Mr. Hogan-Bassey's ability to respond to Commission requests in an honest and forthright way and the care and judgment exercised by Mr. Hart in supplying information in this proceeding. While the inaccurate information could have been decisionally significant, it is not. Moreover, Mr. Hogan-Bassey is no longer a Spectrum principal. Therefore, these inaccuracies will not disqualify Spectrum in this proceeding but the negligence or lack of care they reflect requires a moderate comparative demerit. *Radio Station WABZ, Inc.*, 90 F.C.C. 2d 818, 825-27 (1982).

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[6] In some instances the Commission has permitted the inexperienced principals to rely on their engineer and to escape responsibility for his or her actions, but in this case the engineer was a principal and another Spectrum principal, Thomas Hart, suggested to Mr. Hogan-Bassey, that he use the already filed engineering. Mr. Hart also undertook to review the engineering, assisted in alteration of the maps, and questioned Mr. Hogan-Bassey about the result.

The Comparative Case

Diversification of Ownership of the Mass Media

66. Both applicants, Minority and Spectrum, and the principals of both applicants, do not own mass media interests. Minority, however, urges that Margaret Bush Wilson's relationship to the KWUR-FM, St. Louis, Missouri and the NAACP's *Crisis* magazine warrants assessment of a slight comparative demerit against Spectrum. Ms. Wilson is Spectrum's President and holds 22.75 percent of its stock. She also proposes to work full time at the station and would assist in managing the station. Her relationship to KWUR-FM is indirect and it is not one of ownership. She is a member of the Board of Directors of Washington University, a St. Louis educational institution, which operates KWUR-FM. However, Ms. Wilson has no role in operating or overseeing the station as a university board member. It can be concluded, as Spectrum urges, that Ms. Wilson's "interest, however it may be described, is simply too remote and attenuated to be given weight . . .." *Waters Broadcasting Corporation*, 88 F.C.C. 2d 1204, 1207 (Review Ed. 1981), *rev'd on other grounds*, 91 F.C.C. 2d 1260, 1265 (1982).

67. Similarly, Ms. Wilson has no ownership interest in *Crisis* magazine. Moreover, *Crisis* magazine is the house organ of the national civil rights organization, NAACP, and there is no evidence that it competes with television for consumer time. *See Southland Television Co.*, 20 F.C.C. 159, 164 (1955); *See also Loyola University*, 12 Radio Reg. (P&F) 1017, 1112 (1956). (Loyola's publications were not weighed under the diversification criterion, first because of the nature of the content of the publications, and second because the publishing was independent of the applicant for legal and practical purposes.) Minority argues that Ms. Wilson's relationship to *Crisis* is the same as the 50 percent owner of a newspaper which had a circulation in the proposed service area that the Review Board described as "not insubstantial" in *Merrimack Valley Broadcasting*, 92 F.C.C. 2d 506, 517 (Review Bd. 1982).

68. Aside from the absence of the decisionally crucial fact of ownership, there is no showing that the circulation of *Crisis* is significant in the area of proposed service. For these practical and legal reasons Spectrum will receive no demerit for Ms. Wilson's association with *Crisis.*

Full-time Participation in Station Operation by Owners

69. All the current owners of both applicants would participate full time in the operation of the station. Spectrum's former stockholder, Eddie Hogan-Bassey, a 1.5 percent stockholder, has withdrawn; therefore, Spectrum's percentage of participation is 98.5 percent and Minority's is 100 percent. This difference is unimportant to determining which applicant would be best under the integration criterion; in terms of legal

responsibility and day-to-day participation the parties are the same. Minority has four stockholders who propose to participate as follows: Steven Roberts, a 46 percent stockholder, would be the General Manager; Michael Roberts, also a 46 percent stockholder, is the proposed Sales Manager; Mark Roberts, a 4 percent stockholder, would be the Public Affairs Director; and Artis Talley, Jr., a 4 percent stockholder, would be the Operations Manager — supervising the technical engineering aspects of the station.

70. Spectrum has six stockholders who propose to participate as follows: Margaret Bush Wilson, a 22.75 percent stockholder, would be public affairs and community production director; Curtis C. Crawford, a 22.75 percent stockholder, would be the producer of community-oriented programs; Thomas A. Hart, Jr., a 22.75 percent stockholder, would be News and Editorial Director; Marion E. Officer, Jr., a 15.015 percent stockholder, would be Coordinator of Young Adult and Children's Programs; Myrtle B. Officer, a 7.735 percent stockholder, would be the Business Manager and Public Relations Director; and Frank Wyche, a 7.5 percent stockholder, would be the Sales Manager.

71. The Commission looks "to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965). "[P]articular weight [is accorded] to staff positions held by owners, such as general manager, station manager, program director, business manager, director of news, sports, or public service broadcasting and sales manager." *Id.* All of the integrated stockholders of both applicants meet this policy goal and would occupy policy positions that are the same or similar to the examples just given. On occasion, the Commission has established a hierarchy of these positions to determine whether the position proposed will permit the exercise of authority. *East St. Louis Broadcasting Co.*, 29 F.C.C. 2d 170, 171-2 (1971). For example, in *East St. Louis* a stockholder with a small amount of stock was going to work as General Manager of the station. The Commission believed his holding that position indicated he would exercise extensive authority because he would be the only stockholder working at the station and because he had had broadcast experience. To an equal degree both Minority and Spectrum will have all of their stockholders making day-to-day policy decisions. It would be speculative to conclude that, when all stockholders, corporate officers, and directors are working at the station in positions covering a full panoply of station functions, one applicant or

another would exercise less authority over the station's policies.[7] From the outset, the Commission has maintained that the factors cited in the *Policy Statement* cannot be assigned absolute values. 1 F.C.C. 2d at 393. Quantitatively the two applicants stand equal.

72. Qualitatively local residence is most important and while broadcast experience is not so significant, it is also accorded value. Minority has one stockholder who lives in East St. Louis, Artis Talley, Jr. Mr. Talley owns 4 percent of the applicant and he has participated in civic activities in East St. Louis. Spectrum has two stockholders that live in East St. Louis, Myrtle Officer and Marion Officer, Jr.; they own 22.75 percent of Spectrum's stock; and they have both participated in East St. Louis civic activities. The remaining three stockholders of Minority live in St. Louis, which would be within the city-grade signal of the proposed station and they are all active in St. Louis civic affairs. The same is true, except for Thomas Hart, for the remaining Spectrum principals, and Mr. Hart would move to East St. Louis. On the basis of local residency, Spectrum warrants a preference because it has greater direct ties with East St. Louis and would increase those ties to a greater degree if its application is granted.

73. Broadcast experience is a factor in which Spectrum and Minority are slightly different. Minority's principals, Artis Talley and Steven and Michael Roberts have some broadcast experience, although none is employed by a station at this time and the Roberts' experience was as students at college radio stations; Spectrum's Hart has experience similar to the Roberts', but, in addition, he has had experience in commercial broadcasting. But, most significantly, Spectrum's Frank Wyche has long-term sales experience st St. Louis television stations and he is currently employed in sales at a St. Louis station. A slight preference is, therefore, given to Spectrum.

74. All of the stockholders of both applicants are black, but only Spectrum has women stockholders, Margaret Bush Wilson and Myrtle Officer. They represent nearly 38 percent of the ownership. Spectrum warrants a substantial preference for integrating women owners. Clearly on the basis of its women stockholders, local ownership with civic participation, and broadcast experience, Spectrum is to be preferred qualitatively; however, because the differences, except for the integration of women, are not great, they receive only a slightly greater than moderate preference on qualitative grounds. Because this is the only area

[7] Minority has asserted that Spectrum's Margaret Bush Wilson and Curtis Crawford would share some functions and, therefore, they cannot both be credited with policy positions. While to some degree this may be true, they also would perform quite different jobs calling for independent policy assessment.

of difference, Spectrum receives a moderate preference for its integration proposal.

Auxiliary Power and Comparative Coverage

75. Minority requests a preference for proposing auxiliary power, but television proposals are not entitled to such a preference and, therefore, none will be given. *Addendum to Policy Statement*, 2 F.C.C. 2d 667 (1966). Minority would provide greater Grade B coverage than Spectrum. Minority's Grade B contour extends a fifth television service to 873 persons in an area of 17.5 square miles. Because this difference in coverage occurs in an area that already has an abundance of service from four television stations and affects so few people in a very small area, no preference is warranted for a more efficient use of the channel. *See Resort Broadcasting Co., Inc.*, 41 F.C.C. 2d 643, 647 (1973).

Controlling Comparative Factors

76. Spectrum is entitled to a moderate preference for its integration proposal; the preference is awarded entirely because of qualitative factors. In addition, Spectrum has received a moderate comparative demerit because of its failure to exercise good judgment and care in providing information and because of the untruthful representations made by a former stockholder and principal. In this case the demerit is more important in assessing the comparative quality of Spectrum's proposal. The preference awarded Spectrum because some of its principals lived in East St. Louis and participated in its civic affairs, have worked as broadcasters, and would bring women owners into management is based on presumptions applied to all applicants. But the demerit assigned to Spectrum is based on its actual conduct in this proceeding and demonstrates Spectrum's behavior in the confines of a regulatory proceeding. Based on these differences, Spectrum's behavior which led to the demerit must be weighed more heavily than the preference based on qualities held by some of its stockholders, which routinely give rise to presumption about future conduct. That being the case, Minority, which proposes 100 percent integration, is without media interests, and offers some enhancing qualitative attributes, would better serve the public interest.

ACCORDINGLY, IT IS ORDERED that the application of Spectrum Telecommunications Corporation IS DENIED and the application of Minority Broadcasters of East St. Louis, Inc. (File No. BPCT-811208KG) for a television construction permit to operate on Channel 46 at East St. Louis, Illinois IS GRANTED.[8]

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMAN, *Administrative Law Judge*

Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Civic Participation
Female Ownership-Participation
Local Residence
Minority Ownership

Review Board affirmed *ID* and granted FM application of integrated sole proprietor earning substantial minority and slight broadcast experience preferences. Loser, also 100% integrated, has 80% female enhancement and a small local residence and civic participation and a minor auxiliary power preference. Local residence accruing after application filing date merits slight credit only.
—*MTF Enterprises*
MM Docket No. 83-646

FCC 84R-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises Los Osos-Baywood Park, California	MM Docket No. 83-646 File No. BPH-810929AD
Eduardo Diaz Los Osos-Baywood Park, California	MM Docket No. 83-651 File No. BPH-820524AX
For Construction Permit for a New FM Station	

Appearances

Steven J. Pena and *David Meyers*, on behalf of MTF Enterprises; and *William M. Barnard* and *Mark Van Bergh*, on behalf of Eduardo Diaz.

DECISION

Adopted: October 2, 1984; Released: October 5, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. We have before us for consideration the mutually-exclusive applications of Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises (MTF) and Eduardo Diaz (Diaz) for authority to construct a new FM broadcast station to operate on Channel 267B at Los Osos-Baywood Park, California. By *Hearing Designation Order* (*HDO*), 48 Fed. Reg. 32676, published July 18, 1983, the applications of MTF, Diaz and six other applicants were designated for consolidated comparative hearing. The latter six applications were subsequently dismissed with prejudice by the ALJ. The only issue specified with respect to MTF and Diaz was the standard comparative issue to determine which applicant would, on a comparative basis, best serve the public interest. *HDO*, para. 18. The *HDO* also stated that comparative areas and populations and the availability of other primary aural services in such areas would be considered under the standard comparative issue. *Id.*, para. 13.

2. In an *Initial Decision* (*I.D.*), FCC 84D-22, released March 28, 1984, presiding Administrative Law Judge Joseph Chachkin (ALJ) found the applicants to be equal with respect to both diversification of control of the mass media and the quantitative aspect of integration of ownership and management (100% credit each).[1] However, he further found that Diaz's qualitative enhancements for 100% integrated minority ownership, proposed future local residence, and prior broadcast experience outweighed MTF's enhancements for 80% integrated female ownership, local residence and civic participation since June 1980, and limited prior broadcast experience, as well as MTF's very slight auxiliary power preference; he therefore granted the Diaz application.

3. The proceeding is now before the Review Board on exceptions filed by both applicants. The Board has reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held June 15, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Diaz's application will best serve the public interest.

4. *Integration of Ownership and Management.* MTF was credited for the proposed fulltime integration of Margrethe T. Friedman, an 80% general partner in MTF, as the station's co-general manager, personnel director, and manager of EEO programs, and her husband Thomas B. Friedman, a 20% general partner, as co-general manager and chief engineer. *I.D.*, paras. 4-6, 15. This integration proposal was qualitatively enhanced by the partners' local residence and civic participation in Los

[1] He also found that the parties had stipulated that there were no significant differences in their comparative coverage proposals. *I.D.*, para. 14.

Osos since June 1980, Mr. Friedman's past broadcast experience as an engineer and as past (1958-1960) majority owner of a station who spent weekends reviewing station operations, and Mrs. Friedman's status as a female owner who will be integrated full time into management of the station. *Id.*, paras. 7-10, 16; *see* Tr. 95.

5. In its limited exceptions, Diaz challenges the award of 100% quantitative credit to MTF for the integration of the Friedmans. He asserts that Mrs. Friedman's role is primarily passive and nonmanagerial and that, to the extent active managerial duties are involved, they can be performed on a less than fulltime (40 hours per week) basis. He also claims that Mr. Friedman's co-general manager responsibilities in charge of sales are nebulous, particularly since MTF intends to hire a full-time sales manager, and that half of Mr. Friedman's time will be spent in his capacity as chief engineer, a role which is not primarily a policy-making one and which is therefore accorded less weight by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Br. at 5-7.

6. We will deny Diaz's exception. Both of MTF's partners categorically assert that they intend to jointly exercise day-to-day managerial and policy-making functions at the station on a full-time (40 hours per week) basis. MTF Exh. 6. At the cross-examination of Mrs. Friedman, Diaz was only able to adduce that she could not precisely allocate how her daily time would be divided among her different station roles and that she could not specify her duties in minute detail. However, she testified that she will supervise the programming department, will be the personnel manager, and will set programming, personnel, and affirmative action policies and will be responsible for assuring their implementation. Tr. 49-72. She affirmed that she will devote 40 hours per week to her duties at the station — and more time if needed. Tr. 54. Thus, MTF has adequately shown that it should be credited for Mrs. Friedman's fulltime role at the station. *See Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 725-26 (Rev. Bd. 1983) (claim of undefined duties rejected); *Family Broadcasting Group*, 93 FCC 2d 771, 776 (Rev. Bd. 1983) (claim of minimal knowledge of proposed duties failed to rebut uncontroverted integration proposal); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-952 (Rev. Bd. 1982) (mere lack of experience not basis for rejecting integration proposal). Mr. Friedman, as co-general manager, will make the day to day managerial decisions at the station in conjunction with his wife (MTF Exh. 6). In addition, he testified on cross-examination that he will be primarily responsible for supervising the sales function, including discussing and establishing policy and sales promotions, maintaining public relations for the station, and supervising the sales manager. Tr. 99-100. He estimated this role would require at least half of his working day. Tr. 100. He will

also serve as chief engineer for the station, a position that will require "perhaps 10, 15, 20 hours [a week] at the most." Tr. 99. In view of this evidence, we affirm the ALJ's crediting MTF for Mr. Friedman's full-time integration because his is a specific 40 hours per week managerial proposal and Diaz has failed to show on cross-examination either that his role will not be managerial or that he will not be able to effectuate his proposal. *See Phoenix Media Corp.*, FCC 84R-57, released August 17, 1984, at para. 12. Finally, the sharing of the "co-general manager" title by the Friedmans is no basis for reducing MTF's integration credit because, in addition to jointly making some decisions, they each will have distinct areas of managerial responsibility as well. *See Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 280 (Rev. Bd. 1984). Diaz's exception must be denied.

7. Diaz, a sole proprietor, was credited for his proposed fulltime (40 to 60 hours per week) integration as general manager of the station. *I.D.*, para. 12. His integration proposal is qualitatively enhanced by his commitment to relocate to Los Osos-Baywood Park, his past broadcast experience, and his membership in an FCC-favored minority group (Hispanic). *Id.*, paras. 12-13.

8. In its exceptions, MTF basically contends that its qualitative enhancements outweigh Diaz's. We must disagree. To begin with, Diaz, a sole proprietor who is credited for a minority enhancement, has a substantial preference over MTF, which has no minority ownership. *See WRLJ, Inc.*, 56 RR 2d 287, 288 (Rev. Rd. 1984). On the other hand, MTF has significant (80%) female enhancement credit. *See New Continental Broadcasting Co.*, 55 RR 2d 413, 415 (Rev. Bd. 1983). In this regard, however, we emphasize that the Commission holds that "minority ownership and participation has more significance as an enhancement factor than female ownership and participation," *Horne Industries, Inc.*, 56 RR 2d 665, 666 (1984). Although MTF is entitled to some edge over Diaz for its local residence and civic participation attributes, that advantage is not nearly sufficient in magnitude to support the "substantial" preferences it seeks. MTF's principals became locally resident and civically active in Los Osos in June 1980,[2] only fifteen months before it filed its application in this proceeding. The ALJ, relying on *Ocean County Radio Broadcasting Co.*, 4 FCC 2d 953 (Rev. Bd. 1966), held that the application filing date was, in essence, a "cut-off" date for local residence credit beyond which time no further, continuing local residence would be recognized for the award of enhancement credit. *I.D.*, para. 16. We disagree, however, with the ALJ's analytic mode. In a much more recent decision, *Bradley, Hand and Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982), we held that civic activities that post-date the application filing date will

[2] They may have joined the local Chamber of Commerce sometime in 1979. Tr. 40.

be accorded some credit, "although not as much as a past record of such activities would warrant." We reasoned there that because the *Policy Statement, supra,* 1 FCC 2d at 396, accords some credit for proposed future local residence, albeit less weight than residence of several years' duration, and past civic participation is considered a part of an owner's local residence background, some slight credit should be awarded current civic involvement. *See also Radio Jonesboro, Inc.*, 55 RR 2d 991, 994 (Rev. Bd. 1984). Similarly, we hold that local residence beyond the application filing date might also receive some slight recognition, but not so much as would accrue to a history of local residence of several years' pre-application duration. Therefore, we find that the Friedmans' local residence and civic participation since June 1980 warrants a preference over Diaz's proposed future residence, but only a spare one because the Friedmans' local residence (and civic activity) fails by a wide margin to satisfy the *Policy Statement's* primary focus on residence of "several years' duration." 1 FCC 2d at 396; *cf. Absolutely Great Radio, Inc.*, 95 FCC 2d 1023, 1029-1030 and n.21 (1983) (no preference awarded where applications were filed in 1978, and one applicant's principals had local residence and civic participation since 1977 and another's "has lived continuously in the city only since 1974"); *Radio Jonesboro, Inc., supra* (applicant with principals having long-term (16- and 24-year) local residence given substantial preference over one with non-local resident principal who will commute).[3]

9. We likewise affirm the ALJ's determination that Diaz's past broadcast experience enhancement credit is superior to MTF's. *I.D.*, para. 17. MTF's credit rests solely on the broadcast background of its 20% owner, Thomas Friedman, a professional engineer, who has served in the past as chief engineer of a television station and as broadcast consultant on technical matters, has supervised construction of broadcast stations, and during 1958-1960 was a 80%-90% owner of an AM broadcast station where, although he held no broadcast managerial position, regularly

[3] MTF, *citing Radio Jonesboro, supra,* seeks a separate substantial civic participation preference. Under the *Policy Statement, supra,* civic participation will be considered "as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the Community." 1 FCC 2d at 396. *Radio Jonesboro* dealt with the unusual situation where a principal did not reside in the community or service area but had nevertheless demonstrated a record of civic participation in the proposed community worthy of credit because it demonstrated area familiarity. We held there that the *Policy Statement* did not make local residence a prerequisite for civic credit and thus we recognized that "some credit" for such civic involvement should be credited. In the instant case, however, it makes no decisional difference whether a combined preference or separate local residence and civic participation preferences are formally awarded. Because of the Friedmans' short-term nexus with the community, small preferences only are earned by MTF under either analysis. Therefore, only slight enhancement is awarded.

spent weekends "reviewing the activities of the station in all senses." *I.D.*, at para. 7; Tr. 95, 96. He also testified that he spent "several months" in 1949 as one of three "co-general managers" of a television station who "concentrate[d] on our own spheres of activity." Tr. 92. His responsibilities there were predominantly technical. Tr. 91-92. Diaz, on the other hand, is a 100% owner who has broadcast experience which is largely in sales and sales management. He also served as a general manager from January 1973 to December 1974. *I.D.*, para. 13; Diaz Exh. 1, p. 2. While both men have noteworthy broadcast experience, the important difference between the applicants is that Diaz has 100% enhancement credit while MTF has 20% credit only — based on Mr. Diaz's and Mr. Friedman's respective ownership shares. *See New Continental Broadcasting Co., supra*, 55 RR 2d at 415 (stock ownership interests of integrated principals are a proper focus for awarding enhancement credit). Therefore, we affirm the ALJ's award of a minor experience preference to Diaz. *Id.*

10. *Comparative Summation.* No preference has been awarded under the diversification of control of mass media criterion. Both applicants are tied with 100% quantitative integration credit. Diaz has a significant FCC-favored minority enhancement and a slight broadcast experience preference, whereas MTF is credited with female enhancement as well as a small local residence and civic participation preference and a preference for auxiliary power. In this case, Diaz's status as a member of an FCC-favored minority group is the outstanding qualitative difference between the applicants. Therefore, Diaz is awarded a slight but dispositive overall integration preference, *see Phoenix Media Corp., supra*, para. 15; *Radio Jonesboro, supra*, 55 RR 2d at 994, 996 (slight qualitative differences loom large in a close case), which in turn overcomes MTF's very minor auxiliary power preference (*I.D.*, n.6). *See Communications Properties, Inc.*, 92 FCC 2d 45, 50 (Rev. Bd. 1982).

11. *Motion to Enlarge.* As a final matter, MTF excepts to the ALJ's ruling denying its November 16, 1983 motion to enlarge issues which sought the addition of reporting and misrepresentation/lack of candor issues against Diaz. *See Memorandum Opinion and Order*, FCC 84M-295, released January 19, 1984, paras. 4-5. MTF alleges that the Diaz application, as originally filed on May 24, 1982, contained inaccurate dates for Diaz's past broadcast employment and inaccurate descriptions of Diaz's roles at Stations KZON and KXFM, Santa Maria, California (where he claimed to be general manager between 1972 and 1974), and Station XHRM, Tijuana, Mexico (where he stated he had been sales manager). MTF also claims that Diaz recently failed to timely update his application to reflect his broadcast employment from August 1982 to November 1983.

12. We note, however, that in his November 1, 1983 amendment (filed 2 weeks before the MTF motion here at issue), Diaz voluntarily corrected

the dates of his former employment (which had minor, decisionally insignificant errors only in the original application), supplied updated information concerning his recent broadcast employment, and deleted his previous note that he had been general manager of KXFM but continued to aver that he held that position at KZON. Diaz's earlier reference to KXFM is apparently explained by the fact that shortly after he left KZON in December 1974, these two Santa Maria stations became commonly-owned. Hence and contrary to MTF's assertion, Diaz's equivocation is not decisionally significant because Diaz receives no less credit for his 2 years spent as general manager of KZON than he would have received had he simultaneously held that position at both stations for the same period of time. Diaz also clarified his role at XHRM, stating that, rather than actually being the Tijuana station's sales manager, he functioned in an equivalent role for a time broker who purchased 18 hours of air time from that station. MTF does not challenge the accuracy of these clarified assertions. Thus, since the record as clarified and as a whole shows no motive or intent to deceive, conceal, or mislead concerning his broadcast experience, and does not reflect a pronounced pattern of inattentiveness or carelessness, we affirm the ALJ's ruling denying MTF's motion to enlarge issues. *See Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 (1983).[4]

13. ACCORDINGLY, IT IS ORDERED, That the contingent motion to enlarge issues filed August 13, 1984 by Eduardo Diaz IS DIMISSED; and

14. IT IS FURTHER ORDERED, That the application of Eduardo Diaz (File No. BPH-820524AX) for a construction permit for a new FM broadcast station at Los Osos-Baywood Park, California IS GRANTED, and the application of Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises (File No. BPH-810929AD) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[4] On August 13, 1984, Diaz filed a "contingent" motion to enlarge issues requesting the addition of *ex parte* issues against MTF in the event Diaz's application is not granted. Because we affirm the ALJ's grant of the Diaz application, the "contingency" does not arise and no useful purpose would be served by ordering further hearing in this case. We therefore will dismiss Diaz's motion.

FCC 84D-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises Los Osos-Baywood Park, California	MM Docket No. 83-646 File No. BPH-810929AD
Eduardo Diaz Los Osos-Baywood Park, California	MM Docket No. 83-651 File No. BPH-820524AX
For Construction Permit for a New FM Station	

Appearances

David Meyers and *Steven Pena*, on behalf of Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises; *William M. Barnard* and *Mark Van Berg*, on behalf of Eduardo Diaz; and *Brian P. Kilbane* and *Stephen Yelverton*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 26, 1984, Released: March 28, 1984

Preliminary Statement

1. This proceeding involves mutually exclusive applications for authority to construct a new commercial FM broadcast station on Channel 267B at Los Osos-Baywood Park, California. The two remaining applicants, Thomas B. and Margrethe T. Friedman, d/b/a MTF Enterprises (MTF) and Eduardo Diaz (Diaz), were designated for hearing in a Hearing Designation Order released July 12, 1983 (MM-5217) along with the applications of Long Cove Communications, Inc., Coastal Broadcasting Company, Robert T. Mindte and Robert A. Mindte, Osos Valley Broadcasters, Route One Radio and Alpert Broadcasting Company. At various stages of this proceeding, all applications except those of MTF and Diaz were dismissed with prejudice.

2. The issues designated with respect to MTF and Diaz are:

1. To determine which of the proposals would, on a comparative basis best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

In addition, the designation order noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Therefore, the designation order specified that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue.

3. The prehearing conference was held in this proceeding on September 16, 1983. The hearing in this proceeding was held on November 15, 1983. The record was closed by Order released January 19, 1984 (FCC 84M-295). Proposed findings of fact and conclusions of law were filed January 9, 1984 by MTF and Diaz; replies were filed on January 25 and 26, 1984.

Findings of Fact

MTF Enterprises

4. MTF Enterprises is a general partnership composed of Margrethe T. Friedman and Thomas B. Friedman, husband and wife. Mrs. Friedman is 80% partner and Mr. Friedman is 20% partner (MTF Ex. 5). The Friedmans have no media interests (MTF Ex. 7).[1]

5. Mrs. Friedman will be co-general manager and, in that capacity, will make the day-to-day managerial decisions at the station in conjunction with her husband. Mrs. Friedman will be employed on a full-time (at least 40 hours per week) basis (MTF Ex. 6). Mrs. Friedman will also serve as personnel director and manager of EEO programs (MTF Ex. 6). As personnel manager, she will have responsibility for hiring and firing employees and providing counseling to them if problems arise (Tr. 55). As manager of EEO programs, she will set policy and see that it is implemented (Tr. 62). Mrs. Friedman will also set programming policy and supervise that department (Tr. 69).

6. Mr. Friedman, the other co-general manager, will also devote full-time (at least 40 hours per week) to the station (MTF Ex. 6). Mr. Friedman

[1] Mr. Friedman held a 6% limited partnership interest in low power TV construction permits for stations to be located in Wailuku, Hawaii and Anchorage, Alaska. At the time of issuance of the construction permits, Mr. Friedman promised to dispose of the low power TV interests if the MTF application for Los Osos is granted (MTF Ex. 7). By *Order*, FCC 84M-306, released January 20, 1984, the Presiding Judge accepted MTF's amendment reporting Mr. Friedman's disposition of his low power interests.

will also act as chief engineer and supervise the sales activities of the station (Tr. 68-69, 99).

7. Mrs. Friedman has no prior broadcast experience (Tr. 29). Mr. Friedman is a registered professional engineer (MTF Ex. 3). He has been engaged as a consultant on technical matters by broadcast stations in past years. He is not currently engaged and has not served as a consultant to a broadcast station for the past 10 to 15 years (Tr. 90-93). Between 1949 and 1952, he was chief engineer of station WXEL-TV, Cleveland, Ohio. His duties were confined to the technical realm (MTF Ex. 3; Tr. 92). During this period, he also supervised, from a technical standpoint, construction of stations in Portland, Oregon, and Kansas City, Missouri (MTF Ex. 3; Tr. 93). Between 1958 and 1961, Mr. Friedman was president and principal stockholder of KNEZ, Inc., licensee of Station KNEZ(AM), Lompoc, California (MTF Ex. 3). During the first of these two years, he held an 80% interest and during the last year, a 90% interest (Tr. 94-95). KNEZ went on the air on 1958 and it was sold at the end of 1960. During this period, the station had several general managers and Mr. Friedman was not involved in day-to-day operation (Tr. 95). He spent two days each week (week-ends) reviewing station operation (Tr. 96).

8. Mr. and Mrs. Friedman are partners in a real estate investment property management, construction and remodeling business known as the Esplanada Company (Tr. 29-30). Mrs. Friedman does not intend to continue to devote time to the business in the event the application is granted (Tr. 77). Mr. Friedman devotes 10 to 15 hours to the business. Mr. Friedman's time is primarily spent in connection with the management of an apartment house, which is being sold (Tr. 97-98).

9. Margrethe T. Friedman was born in Denmark and became a naturalized citizen of the United States in the early 1960s (MTF Ex. 2). She has completed 6 units in post-graduate work in radio and broadcasting at the University of California at Los Angeles (Tr. 74). Prior to June, 1980, Mrs. Friedman and her husband lived in Playa Del Rey, California, which is outside of the primary service area of MTF's proposed station. Mr. and Mrs. Friedman moved to Los Osos in June, 1980 (Tr. 37). After moving to Los Osos in June, 1980, Mrs. Friedman transferred her membership in or joined several organizations in the Los Osos area (Tr. 39). She is not an officer or director of any of these organizations (Tr. 38). Her participation in these organizations, in addition to being a dues paying member, is confined to participating in the preparation of a news letter for the Chamber of Commerce to which she devotes approximately one-half day per month and publicizing activities in the community on which she spends approximately one day per month (Tr. 78). She is involved in the People Helping People Organization. She spends two to four hours per week "observing" senior citizens and attempting to get assistance for their

needs and she has been active in fund-raising activities for the Lions Club (Tr. 79-80). She has also participated in organizing games to raise funds for a building for the South Bay Community Activities, Inc. (MTF Ex. 2, Tr. 79-80). She also spent approximately one-half day assisting the library association with publicity and fund raising activities.

10. Mr. Friedman is a First Vice-President of the Bay-Osos Lions Club, and Chairman of the Drainage Committee of CSA's Number 9 Advisory Group. He was foreman *Pro-Tem* for the last San Luis Obispo Grand Jury, and is a past board member of the South Bay Community Council. He is currently a member of South Bay Community Activities, Inc.; Downtown Baywood Park Association (publicity chairman); People Helping People; Los Osos - Baywood Park Chamber of Commerce; and Morro Bay Natural History Association (MTF Ex. 3).

11. MTF Enterprises has proposed to install auxiliary power equipment which would generate power sufficient to assure continuous operation of the station during a power failure or other emergency condition. This equipment will be installed at the transmitter site and the main studio site (MTF Ex. 4).

Eduardo Diaz

12. Eduardo Diaz is an individual applicant and, as such, will be the 100% owner of the station he proposes to construct (Diaz Ex. 1; Tr. 109). Mr. Diaz is of Hispanic heritage. He currently resides in Santee, California. On grant of this application, Mr. Diaz will relocate to Los Osos-Baywood Park and will work full-time, 40 to 60 hours a week, as general manager of his station. As general manager, Mr. Diaz will oversee all station operations and will be directly responsible for the station's day-to-day operation (Diaz Ex. 1). Mr. Diaz has no interest in any media of mass communications (Diaz Ex. 1).

13. Mr. Diaz has prior broadcast experience. Mr. Diaz has worked at Stations WSON(AM/FM), San Diego, California since August, 1982. Between the periods August, 1982 and until October, 1983, he has held the position of account executive (Tr. 107). Prior to working at KSON, Mr. Diaz worked as an account executive at KCBZ(AM/FM), San Diego, California, from February, 1981 to August, 1982, and from June, 1977 to December, 1979. From December, 1979, to December, 1980, Mr. Diaz worked for Mr. Don Wolfstone, who purchased time from Station XHRM, Tijuana, Mexico, which was then sold to advertisers in the United States. While working for Mr. Wolfstone, Mr. Diaz was located in San Diego, California, and served as general sales manager. Mr. Diaz worked as an account executive at Station KOAN, San Diego, California, from May, 1975 to June, 1977. From February to April, 1975, Mr. Diaz worked as sales supervisor at Station KMLO, Vista, California, where he was

responsible for overseeing the station's sales department and determining advertising rates and promotions. Vista is located in San Diego County, approximately 30 miles north of San Diego (Diaz Ex. 1; Tr. 118). He worked as general manager of Station KZON(AM), Santa Maria, California, from January, 1973 to December, 1974, and he was also general manager of co-owned Station KXFM(FM) for a one year period in 1973-1974 (Tr. 114-118). He supervised approximately 10 persons at these stations (Tr. 119-120).

Comparative Coverage

14. Prior to the hearing proceeding on November 15, 1983, counsel for Diaz requested the following stipulation from the other parties:

> There is no decisionally significant difference in the areas and populations to be served within the remaining applicants' proposed 1 mVm service areas and . . . there is no decisionally significant difference in the comparative coverage of the applicants.

The stipulation was agreed to by MTF at the November 15, 1983 hearing (Tr. 18) and the stipulation was received as Diaz Exhibit 2. As a result of this stipulation, which was unopposed by the Mass Media Bureau, no areas and population information is contained in this record.

Conclusions

15. The standard comparative issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communication. The diversification criterion is of no significance in this case since none of the applicants own media interests.[2] With respect to the best practicable service criterion, both applicants propose 100% full-time integration. Contrary to Diaz' assertion, the management roles of the Friedmans are clear and unambiguous. Diaz has not offered evidence which would justify awarding MTF less than 100% integration credit. The record makes clear that the Friedmans will occupy meaningful management positions. In this connection, Mr. and Mrs. Friedman will be co-general managers on a full-time basis and will make the day-to-day managerial decisions. In addition, Mrs. Friedman will serve as personnel manager, manger of EEO programs and also set programming policy and supervise that department. Mr. Friedman will act

[2] As noted, *supra*, Mr. Friedman, at one time, held a 6% limited partnership interest in low power TV construction permits. However, the interest will not be counted against MTF in light of Mr. Friedman's promise, made at the time of the issuance of the construction permits, to dispose of such interest of MTF's application is granted.

as chief engineer and supervise the sales activities of the station. Both applicants will receive 100% quantitative integration credit.

16. Since the applicants are quantitatively equal, resolution of this case rests on examination of the qualitative attributes of the applicants. MTF receives enhancement credit for Mrs. Friedman's 80% female ownership. However, female ownership is a merit of lesser significance than minority ownership. *Horne Industries, Inc.*, 54 RR 2d 249 (Rev. Bd. 1983). MTF also receives local residence and civic participation enhancement credit. However, to be meaningful, an owner's local residence must be of "several years" duration. *Policy Statement, supra*, 1 FCC 2d at 396. The Friedmans' local residence is of brief duration; they moved to Los Osos in June, 1980. Moreover, the relevant date for establishing length of residence is the date of application filing. *Ocean County Radio Broadcasting Company*, 4 FCC 2d 953 (Rev. Bd. 1966). MTF's application was filed on September 29, 1981 and, thus, the Friedmans had lived in Los Osos only approximately 15 months when their application was filed. Further, "past participation in civic affairs will be considered as a part of a participating owner's local residence background." *Policy Statement*, 1 FCC 2d at 396. In this connection, the Friedmans' civic participation in Los Osos affairs is of equally brief duration since it did not begin until after the Friedmans moved to Los Osos. There is no evidence that the Friedmans participated in civic activities in the Los Osos area prior to their move to that community. For these reasons, MTF receives only slight local residence and civic participation enhancement credit. See *Ocean County, supra*; *Charles Vanda*, 4 FCC 2d 655 (Rev. Bd. 1966). MTF also receives enhancement credit for Mr. Friedman's (20% interest) prior broadcast experience. However, since Mr. Friedman's broadcast experience is largely confined to an engineering role and to a two year period when he owned and oversaw a station twenty years ago, such enhancement credit is slight.[3] On the other hand, because Mr. Diaz is a minority group member, he is entitled to "substantial" enhancement credit. *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1266 (1982). While Mr. Diaz is not presently a local resident, he intends to move to Los Osos. Proposed future local residence is also accorded weight, although to a lesser extent than present local residence. *Policy Statement, supra*, 1 FCC 2d at 396. Mr. Diaz is also entitled to substantial enhancement credit for his prior broadcast experience because of the length and quality of such experience.[4]

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[3] As pointed out by Diaz, Mrs. Friedman's graduate course in radio and broadcasting does not qualify as prior broadcast experience.

[4] It should be noted that this enhancement factor is of only "minor significance" *Policy Statement, supra*, 1 FCC 2d at 396.

17. Diaz will be given a moderate to substantial integration preference over MTS. Diaz' 100% minority status is superior to MTF's 80% female integration preference. In addition, MTF's short time local residency and civic participation does not offset Diaz' "substantial" preference for 100% minority ownership.[5] Diaz' prior broadcast experience credit is also superior since the broadcast experience attributable to MTF is related only to Mr. Friedman's 20% ownership interest and that experience is limited for the most part to technical experience. When all qualitative factors are considered, it is clear that Diaz is the winner.[6] It is, therefore, concluded that the public interest is better served by a grant of Diaz' application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Eduardo Diaz IS GRANTED and the application of Thomas B. and Margrethe T. Friedman d/b/a MTF Enterprises IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

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[5] In *Waters Broadcasting Corp., supra*, at 91 FCC 2d 1260, 55 RR 2d 1068, the Commission stated that the "... Review Board gave insufficient weight to the Commission's minority ownership policy. While the policy favoring local ownership may be first in time [*i.e.*, being adopted before the minority ownership policies were adopted], it is not thereby first in importance. As we have emphasized, the fostering of minority ownership is also in and of itself a fundamental policy goal of this Commission. The Commission's licensing policy favoring diversification of control of broadcast ownership is also served by our minority ownership policy, and we have identified minority ownership as a 'touchstone' for the application of a number of other Commission policies" (footnote omitted).

[6] MTF is entitled to very slight preference for auxiliary power. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 667 (Rev. Bd. 1982). However, that factor does not change the result reached here.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Domestic Public Land Mobile Service
Frequency Allocation, Common Carrier
Rural Radio Service

Commission eliminated separate frequency allocation structure 22.501 in Public Land Mobile Service. All carriers can apply for frequencies which were allocated separately to wireline and nonwireline carriers. Changes in Rural Radio Service rules were also effected. Commission denied Petitions for Reconsideration of interim procedures established for filing of applications during pendency of rulemaking.
—*Public Land Mobile Service*
CC Docket No. 83-1146

FCC 84-485

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Elimination of the Separate Frequency Allocation Structure in the Public Land Mobile Service (Rules Section 22.501)	CC Docket No. 83-1146
In the Matter of	
Revision and Update of Part 22 of the Public Mobile Radio Service Rules	CC Docket No. 80-57

REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: October 17, 1984; Released: December 11, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. Introduction

1. In the *Notice of Proposed Rulemaking* (*Notice*) in CC Docket No. 83-1146, 95 FCC 2d 834 (1983), the Commission proposed to amend Part 22 of the Public Land Mobile Radio Service rules to eliminate the separate frequency allocation structure set forth in Section 22.501(b), (c), (h), (i) and (j) (47 C.F.R. §22.501). *Elimination of Separate Frequency Allocation*, 95 FCC 2d 834 (1983). The policy of maintaining separate wireline and

nonwireline frequency allocations has become known as the "fence."[1] A policy of granting limited waivers of the separate allocation rules had been proposed in the *Revision and Update of Part 22, Notice of Proposed Rulemaking*, 47 Fed. Reg. 43842, 43846 (1982) (proposed §22.501(n)). However, after examining the comments in that proceeding the Commission determined that the central issue was the separate allocation itself and began this proceeding to examine whether to eliminate the fence. We also proposed revision of certain rural radio service rules, because eliminating the fence could have an impact on this service. After carefully reviewing the comments in this proceeding we have decided to amend our rules to eliminate the separate frequency allocation. Because this action will have an impact on the rural radio service, we have also decided to amend certain rules in the rural radio service.

2. We are also addressing in this document certain petitions for reconsideration of our *Report and Order* in CC Docket No. 80-57, which revised numerous sections of Part 22. In that proceeding, we established interim procedures for applications requesting waivers of the separate allocation during the pendency of the "fence" rulemaking. *Revision of Part 22*, 95 FCC 2d 769, 825 (1983). Various parties commented and filed petitions for reconsideration of this decision. To the extent these pleadings addressed the interim waiver policy, we are disposing of them here.[2] After full consideration of the arguments against the interim procedures for applications requesting waivers of the fence, we have decided to deny reconsideration.

II. Background

3. The separate allocation was first adopted in 1949, in the *General Mobile Radio Service* proceeding, *Report and Order*, 13 FCC 1190, *recon. denied*, 13 FCC 1242 (1949). The Commission stated there:

> The Commission has, in the disposition of this docket and related proceedings, made provision for . . . the development of competitive communications common carrier systems . . . [W]e have taken particular care to provide a family of frequencies within which the development of common carrier mobile radio systems by enterprises other than existing telephone companies may take place. These dispositions have been effected advisedly, and with the purpose, among others, of fostering the development of competing systems, technologies and equipments.

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[1] By virtue of the fence, certain frequencies are assigned to Radio Common Carriers (RCCs)—common carriers engaged in the provision of Public Mobile Service who are not also in the business of providing landline local exchange telephone service. A separate group of frequencies are assigned to wireline common carriers (WCCs)—common carriers in the business of providing landline local exchange telephone service.

[2] All petitions for reconsideration other than those involving the interim waiver policy will be addressed in a separate order.

13 FCC at 1218; *See also ITT Mobile Telephone, Inc.*, 1 RR 2d 957, 963 (1963). In the late 1960s, in the "Guardband" paging allocation proceeding, Docket 16778, the Commission made new paging frequencies available under a separate allocation structure. In the Report and Order making these guardband frequencies available, the Commission repeated its concern for the ability of nonwireline carriers to compete effectively with the wireline carriers and imposed several requirements on wireline carriers. *Allocation of Frequencies (Guard Band)*, 12 FCC 2d 841, 846-51 (1968). In its denial of reconsideration of this allocation, the Commission emphasized the growing competition between telephone companies and the other carriers. 14 FCC 2d 269, 271 (1969). This allocation was upheld on appeal in *Radio Relay Corporation v. FCC*, 409 F.2d 322 (2d Cir. 1969).

4. In recent years, as the market for paging service in particular has become more competitive, we have permitted wireline carriers to provide paging service outside the areas where they provide telephone service. *Bonduel Telephone Co.*, 68 FCC 2d 497 (1978). As competition has continued to grow and large numbers of new non-wireline entities entered the paging business, we have allocated additional paging frequencies without following the separate allocation structure, thereby maximizing the potential for innovative and competitive service offerings without perpetuating a market structure that was properly suited to a fledgling industry. *One-Way Stations in the 928-941 MHz Band*, 89 FCC 2d 1337 (1982), *recon.* 92 FCC 2d 631 (1982), 93 FCC 2d 908 (1983); *One-Way Signaling in the 35 and 43 MHz bands*, 77 FCC 2d 384 (1981).[3]

5. In the *Notice* we stated that nonwireline companies have far more authorizations and applications pending than their wireline counterparts. In a significant number of markets the nonwireline frequencies are completely used, whereas some wireline frequencies remain unused. Further, we noted there was a near-saturation level of use by nonwirelines on their side of the fence.[4] We concluded that if the fence were removed, nonwireline carriers in a saturated market would apply for, and serve the public on, the unused wireline frequencies.

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[3] In the Cellular Service we adopted a separate allocation of limited duration. *See* Cellular Communications Systems, 86 FCC 2d 469 (1981), *modified* 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), appeal dismissed *sub nom.* U.S. v. FCC. Cir. No. 82-1526 (D.C. Cir., March 3, 1983). *See also Cellular Lottery Decision*, 49 Fed. Reg. 3628, 56 RR 2d 8 (1984). The separate allocation was adopted because the Commission found that the fence constituted the most practical, and quite possibly the only, way to achieve the Commission's twin goals of making quality mobile telephone service available to the public as rapidly as possible while promoting competition whenever feasible. *See Notice*, 95 FCC 2d at 837, n.7.

[4] A staff study supported these findings. 95 FCC 2d at 838.

III. Comments

6. A list of the parties commenting on the proposed rule revision is included in Appendix A. While some of the parties supported the proposals, others objected on various grounds and offered alternatives.

7. MCI Airsignal, Inc. (MCI), Message Center, Inc. (Message Center), Telocator Network of America, (Telocator) and Airphone Company, Inc. (Airphone)[5] support elimination of the separate frequency allocation. In comments that are representative of the non-wireline carriers, MCI agrees with the Commission's goals of ensuring efficient use of scarce spectrum and satisfying the substantial unmet demand for one-way paging services. MCI argues that there is no longer any justification for retaining the separate frequency allocation structure and that it should not be preserved in order to insulate wireline carriers from competition or to afford them further time to apply for frequencies which remain underutilized. Message Center states that availability of additional wireline channels for radio common carriers will reduce the scarcity of guardband[6] and UHF[7] frequencies, which is exacerbated by potential interference with Canadian stations.[8] In addition, Message Center asserts, the quality and efficiency of trunking existing frequencies with additional frequencies can only be achieved by allocating previously unused channels to existing carriers operating in the same frequency band.

8. According to Airphone, in the case of the guardband frequencies the scarcity of spectrum available for RCC use has caused the RCC's to share the channels in most metropolitan areas while the WCC's received exclusive use of their guardband channels in the same areas; in many instances, one of the two wireline channels has remained unassigned. Airfone also contends that removal of the separate allocation would eliminate a barrier to fair competition, because half the spectrum is available only to a small number of WCC's, while the other half must be shared by many RCC's.[9] In addition, according to *Airphone*, the *Bonduel* case exacerbated this problem by making unused spectrum available to WCC's all over the country.

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[5] Airphone filed jointly with other parties listed in Appendix A.

[6] The guardband frequencies, which are the most coveted paging frequencies, are four frequencies in the 150 MHz band; two are earmarked for wireline carriers and two for non-wirelines.

[7] UHF frequencies are paired channels in the 450 MHz band that may be used for two-way and paging service. There are 12 wireline channels and 14 non-wireline channels. VHF frequencies (11 wireline and 7 non-wireline paired channels in the 150 MHz band that my be used for two-way and paging service) are already occupied in most markets, so that there are few new licensing opportunities in the VHF band.

[8] Channels within 75 miles of the Canadian Border must be shared with Canadian licensees.

[9] The Commission's tentative conclusions in the NPRM are supported by a study conducted by Comp-Com, Inc. attached to Airphone's comments.

9. Among wireline carriers, United Telespectrum, Inc. (United) stated that if the Commission decides to eliminate the "fence", the elimination should be prospective only; applications filed prior to any adoption of amendments eliminating the fence should be processed under the regulations and policies in effect at the time of filing. It contends that any other result would be contrary to the precepts of administrative law, and would unjustifiably and seriously disadvantage WCC's.[10] The United States Telephone Association (USTA) suggests the establishment of a future date certain for elimination of the fence; it suggests the adoption of a date one year from release of an order for elimination of the wireline/nonwireline allocation, rather than an immediate termination. USTA argues that because wireline carriers have recently demonstrated an increased interest in mobile service in new markets, establishment of a grace period would permit newly interested wireline carriers to provide the competition which seems to be the basic concern of the *Notice*.

10. The joint comments of the Bell Operating Companies (BOCs) contend that there are several technical problems (*e.g.*, frequency coordination for systems that "cross the fence" and problems related to the technical differences between wireline and RCC systems in the 150 MHz band) that cannot be left unresolved when eliminating the fence.[11] The BOCs further argue that unnecessary increases in costs may result from premature crossing of the fence in the 150 MHz band.[12] The BOCs suggest that to remedy this problem the Commission should require all applicants desiring to cross the fence in the 150 MHz band to include in

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[10] United asserts that the interim waiver procedures established in our *Revision and Update of Part 22* violate the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553.

[11] Pacific Bell believes the existence of the fence has kept intact the contiguous spectrum required to implement a new technology of offset channels or channel splitting to relieve congestion in the 150 MHz band, and that when the fence comes down and RCCs begin operating on available channels on the wireline side, the Commission will have lost the ability to use this technology to alleviate overcrowding on land mobile channels in the nation's developing metropolitan areas. It also urges elimination of the separate allocation structure in §22.501(k) if the Commission eliminates the fence. Section 22.501(k) allows nonwireline carriers to participate in operation of specified UHF frequencies upon a cooperative shared basis.

[12] The BOCs point out that the technical parameters for wireline and mobile systems operating in the 150 MHz band are not identical; for example the separation between transmit and receive channels differs between wireline/nonwireline systems. Systems which add channels from the other side of the fence may have to undergo costly equipment modifications in order to establish intrasystem compatibility. If, for instance, an RCC takes up the last remaining WCC frequency in a market, the WCC would have to go to the other side of the fence in order to expand its system (assuming there are RCC frequencies available) with a resultant increase in expenses because of the technical differences. This scenario is so unlikely to occur that we need not consider it in adopting policies here.

their applications a statement that all frequencies on their side of the fence are unavailable.

11. The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) and the National Telephone Cooperative Association (NTCA) believe that there are compelling considerations for maintaining the separate allocation structure. The removal of that structure, according to OPASTCO and NTCA would permit one carrier to become dominant in a market, and reduce or destroy the benefits of competition. They note that the Commission appears to be more concerned with the number of frequencies in use in specific markets than in the competitive effects on the cost to customers of the subject services. Further, OPASTCO and NTCA maintain that the Commission should take a wait-and-see posture rather than take what may be an unnecessary action. Indeed, they note that the Commission has indicated a likelihood "that most two-way service will be provided on cellular systems in the future." Moreover, they argue that the separate allocation encourages technological innovation, such as side-band technology. Finally, OPASTCO and NTCA assert that it would be more productive and consistent with the public interest for the Commission to authorize use of new technologies in these frequencies rather than simply to eliminate the fence. In reply comments OPASTCO recommends as an alternative temporary adjustments to the fence on as close to a market-by-market basis as is possible.

12. Telephone and Data Systems, Inc. (TDS) asserts that the proposal to eliminate the fence curtails the opportunity for telephone companies to participate in the provision of profitable mobile services like paging and mobile telephone at the very time that their need to do so is greatest.[13] Elimination of the fence would so decrease the odds in Commission lotteries in favor of the more numerous RCC applications that significant telephone company participation in these services would be unlikely. TDS contends that this result would be particularly egregious since mobile telephone and paging are natural adjuncts to local exchange service. According to TDS, it would also impair existing telephone company investments by effectively preventing expansion of service areas on the existing frequencies to achieve competitiveness with the more extensive existing RCC systems and prevent the establishment of telephone company systems in new markets on the same frequencies with concur-

[13] According to TDS, the Bell System divestiture, the Commission's revised depreciation policies, and the new competition facing local exchange service from cellular radio and other "bypass" services, have converged to create a great need and incentive for local telephone companies to stabilize their financial well-being by participating in new profitable common carrier services.

rent economies and subscriber benefits.[14] TDS recommends retention of the separate allocation for at least 12 months after completion of this rulemaking proceeding (including dismissal of all RCC applications for WCC frequencies now on file and filed in the interim.)[15] TDS also asserts that eliminating the fence would encourage the growth of a crazy-quilt of new geographically isolated RCC mobile systems at the periphery of major markets (unused wireline guardband frequencies are available only on the periphery of large urban areas) while depriving wireline customers of the opportunity to enjoy expanded service on a single frequency.

IV. Discussion

13. *Elimination of Separate Allocation.* We conclude that elimination of the fence between the wireline and non-wireline frequencies is in the public interest. The fence was established to create and foster competitive alternatives to the wireline carriers. Today, the non-wireline carriers have proliferated, providing real competition with the wireline carriers, and artificial restraints are no longer necessary. Indeed, the existence of the fence may have the effect of restraining the growth of non-wireline carriers, thus lessening the competitive pressure on wireline carriers.[16] In a robust, competitive market, regulatory intervention should be minimal or nonexistent. We conclude that even without the fence, competition will continue to thrive to the benefit of the public. *See Notice,* 95 FCC 2d at 837-839.

14. The dual allocation scheme cannot be maintained in order to insulate wireline carriers from competition for spectrum or to afford them further time to apply for frequencies they have not applied for in the past. First, our mandate is not to protect carriers from competition but rather to serve the public interest. When, as here, competition is not only "reasonably feasible" but demonstrably present, resulting in substantial

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[14] Expansion on the same frequency is necessary for a true wide-area paging system because that is the only way customers can be paged throughout the service area with a single paging unit. TDS further observes that dual frequency pagers are being developed but contends that they are not being widely used, and their cost may never be fully competitive.

[15] TDS alleges the interim procedures adopted in the revision to Part 22 unfairly discriminate against wireline carriers and in many areas, are blocking or seriously delaying the provision of new mobile service to the public for extensive periods. It urges they be modified.

[16] We disagree with OPASTCO's and NTCA's comments that removal of the fence will permit one carrier to become dominant in a market and destroy competition. In the existing environment the wirelines have had an advantage over the nonwirelines. There are many nonwirelines with a limited number of frequencies *vis a vis* a limited number of wirelines with the same amount of spectrum as the nonwirelines. Thus, in general, any given wireline carrier has had access to more frequencies than any one of its non-wireline competitors, thereby virtually ensuring that a wireline carrier will have the ability to serve a larger share of the market than a non-wireline carrier.

public benefits, policies that will foster a more competitive marketplace with less regulatory intervention are clearly in the public interest. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953). Elimination of the separate allocation will obviously foster competition for the remaining frequencies. This can be expected to result in wireline carriers facing more robust competitors in the marketplace, to the benefit of the consuming public. Second, we are convinced that no public interest benefits accrue from further delaying the elimination of the separate allocation.[17] In some markets, the wireline frequencies have lain fallow for many years.[18]

15. With respect to TDS's argument that expansion on the same frequency may have inherent benefits such as economies of scale, we note that we have recently adopted a policy in our general lottery proceeding that permits a carrier expanding an existing system within the frequency band presently used, to request comparative consideration instead of lottery.[19] *Random Selection/Lotteries*, Gen. Docket

[17] Wireline carriers have not exhausted their frequency resources, while non-wireline carriers have long faced a lack of available channels. While we are sensitive to the fact that wirelines have increased interest in these frequencies in recent months, we have not been persuaded that this is sufficient reason to maintain a policy which restricts the development of non-wireline common carrier mobile radio systems.

[18] We reject the argument that the elimination of the fence will curtail the opportunity for telephone companies to participate in the provision of profitable mobile services. We are not curtailing the WCC's ability to compete for the provision of these services. Rather, we are eliminating the set of frequencies allocated to the RCCs and WCCs for their exclusive use. This we believe, in the long run, will foster an even more competitive environment devoid of unnecessary regulatory intervention.

[19] Regarding TDS's argument that wireline carriers will have lowered odds of succeeding in a lottery, we note that wireline carriers have until now rarely faced competition for frequencies. Moving from a preferred position to a level playing field may seem unfortunate to the wireline carriers, but the Commission can hardly be expected to preserve an inequity for the benefit of those enjoying their privileged position. Moreover, our previous policies have fostered a truly competitive market place. Under these circumstances, we cannot be but convinced that our removal of this regulatory restraint will not adversely affect any of the competitors. Our decision here is consistent with our previous decision to retain the fence in the cellular service. First, the cellular set aside is of limited duration (unlike the Section 22.501 fence), to prevent the frequencies from going unused. Second, these services, unlike cellular, are firmly entrenched services. Unlike cellular, the first filed applicant establishes the area he wishes to serve and mutual exclusivity is determined by applicants filing electrically mutually exclusive applications within a prescribed cut-off period; because of this the probability that wireline carriers will have lowered odds of succeeding in a lottery is minimal or nonexistent. No evidence has been submitted in this proceeding that by eliminating the separate allocation the wireline carriers will be displaced from providing such services. Moreover, unlike cellular there are no allegations that conventional mobile services could or will supplant landline local exchange service, with possible detrimental effects on universal telephone service. *Compare, Cellular Lottery Decision*, 49 F. R. 23628, 56 RR 2d 8 at 22-25.

No. 81-768, Memorandum Opinion and Order, FCC 84-596, released December 4, 1984.

16. Elimination of the separate allocation will have the benefit of encouraging the efficient use of our spectrum resources and helping to satisfy the public demand for mobile service. We reject Telespectrum's and TDS' suggestion to eliminate the fence on a prospective basis (one year after the release of an order removing the separate allocation). We can find no benefits to maintaining the fence for one year.[20] In fact, this suggestion would undoubtedly result in a "gold rush" of wireline filings seeking to take advantage of the fence, if not preempt additional RCC entry, while non-wireline carriers continue to experience a shortage of frequencies.

17. We are not persuaded by the BOCs' argument that technical differences on the two sides of the fence (such as differing base-mobile frequency separation) militate in favor of maintaining the separate allocation. In some cases, these technical differences may add to the cost of cross-fence operation, but we believe that applicants should determine whether, in a competitive marketplace, the benefits of expanding from one frequency block to the other outweigh the costs.[21] OPASTCO's, NTCA's and the BOCs' comments that elimination of the fence will prevent technological improvements, such as offset channels and side-band technology, must also be rejected. There is no negative cause-effect relationship between the fence and technological innovation.[22] If the required showings are made, we will continue to authorize new technologies on the unused frequencies even after the fence is eliminated.

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[20] We reject OPASTCO's suggestion that we wait to see whether the wireline carriers' desire for separate frequencies is abated by the availability of cellular service. As we stated in the *NPRM*, "while it is likely that most two-way service will be provided on cellular systems in the future, it is quite possible that conventional two way service will continue to meet the needs of some groups of users. Furthermore, new technologies, such as digital voice transmission and single-sideband, may be developed using the conventional frequencies to complement or provide alternatives to cellular service. Accordingly, we believe that elimination of the fence may well foster innovation in conventional two-way systems."

[21] With respect to fears expressed by the BOCs' that there may be problems such as frequency coordination, difficulties in predicting co-channel interference, and potential problems associated with intermodulation involving nearby systems operating on other frequencies, Section 22.100 requires carriers to minimize interference to nearby systems. Carriers applying across the fence are required to demonstrate interference-free operation just as all applicants in the Public Land Mobile Services must. *See* Sections 22.503, 22.504 of the Rules.

[22] We note that the first common-carrier application for interstitially-spaced amplitude - compandored single sideband service was filed by a non-wireline carrier seeking to use frequencies on the wireline side of the fence. Wireline carriers, however, opposed the application. Contemporary Communications Corp., FCC 84-386, released August 14, 1984.

18. We also reject OPASTCO's recommendation of temporary adjustment to the fence on a market-by-market basis as an alternative to the elimination of the fence. This proposal would be administratively costly and inefficient, and would impose a complex patchwork of regulation on carriers. For similar reasons, we reject the BOCs' request that all applicants desiring to cross the fence in the 150 MHz band be required to certify that all frequencies on their side of the fence are unavailable. This unduly burdensome requirement would be tantamount to retaining the separate allocation. Absent a compelling showing, we will not artificially restrain a carrier's business judgment whether to cross the fence. We also do not find any reasons to impose this additional burden on applicants. However, we will, upon the filing of a proper petition, examine whether a cross-fence application was filed for "strike" purposes. *See Edward C. Smith*, 71 FCC 2d 379, 383 (1979).[23]

19. *Section 22.40.* Another issue pending in this proceeding is whether to exempt the guardband paging channels from the trafficking rule, Section 22.40, as we did other paging channels. *See Notice*, 95 FCC 2d at 839 n.11; *Rewrite of Part 22*, 95 FCC 2d at 800 n.32. In our *Rewrite*, we maintained a limited trafficking rule but exempted paging stations in the 35, 43, and 900 MHz bands from its scope, permitting relatively free transferability of these stations. Paging frequencies in these bands are not subject to a separate frequency allocation; we postponed a decision on whether the trafficking rule should apply to guardband paging channels, pending a decision on whether to eliminate the fence. No party commented on this subject. Since we have decided to eliminate the separate allocation, we will exempt the guardband paging channels from the trafficking rule as well. While there are only a limited number of guardband frequencies available, no commentor articulated any reason to impose a trafficking rule on paging stations on these frequencies while exempting others. Accordingly, for the reasons given in the *Rewrite of Part 22*, we find that the public interest would be served by eliminating the rule.

20. *470-512 MHz Band.* Frequencies in the 470-512 MHz band, which is shared with UHF television channels 14-20, are presently available on an "open-entry" shared basis only to non-wireline carriers. *See* Section 22.501(k). We agree with Pacific Bell that the eligibility restriction in this section should be eliminated. The frequencies in Section 22.501(k) were

[23] Several commentators requested that the Public Notice listing applications crossing the fence as accepted for filing should include the latitudes and longitudes listed. Our current listing of applications on Public Notice does not include latitude and longitude. We are not currently equipped to handle listing this additional information and we will not adopt a special policy only for these applications.

made available only to nonwireline carriers[24] at a time when it was believed that only wireline carriers would offer cellular service.[25] *See Inquiry Relative to Future Use*, note 24, *supra*, 19 RR 2d at 1675. In 1981, however, the Commission took steps to ensure that non-wireline carriers would have as much spectrum for cellular service as the wireline carriers.[26] Because we eliminated the limitation of the cellular service to wireline carriers, we do not believe that the public interest would be served by maintaining the countervailing limitation of the 470-512 MHz channels to non-wireline carriers. We note that no opposition to this proposal has been received. Accordingly, wireline carriers will be able to use the frequencies listed in this section under the same terms and conditions applicable to non-wireline carriers.

21. *Rural Radio.* In the *Notice* we stated that our proposal might have some impact on the rural radio service.[27] To the extent that RCCs, for example, are assigned wireline frequencies on which rural radio service is currently being offered, mobile service congestion on the channel could degrade or jeopardize the quality of the rural radio service. We did not wish, in eliminating the fence, to preclude the possibility of responding to future needs for rural radio service. Because of these concerns, we proposed grandfathering existing rural radio systems to operate on a primary basis rather than secondary as the rules provide. In so doing, we proposed to treat rural radio on an equal footing with the land mobile service and guarantee that rural subscribers in areas with increasing mobile service usage will not be deprived of service.[28] Future

[24] *See* Land Mobile use of TV Channels 14 through 20, Docket No. 18261, 23 FCC 2d 325, 349 (1970); 30 FCC 2d 221 (1971); 36 FCC 2d 588 (1972); 43 FCC 2d 949 (1973); 48 FCC 2d 360 (1974). *See also* Land Mobile Channels, 69 FCC 2d 1555 (1978); 77 FCC 2d 201 (1980).

[25] Inquiry Relative to the Future Use of the Frequency Band 806-890 MHz, 19 RR 2d 1663 (1970); recon. granted in part, 31 FCC 2d 50 (1971); 46 FCC 2d 752 (1974), recon. granted in part, 51 FCC 2d 945, clarified, 55 FCC 2d 771 (1975), aff'd sub. nom. *NARUC v. FCC*, 525 F. 2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).

[26] Cellular Communications Systems, *supra* note 3.

[27] The rural radio service presently uses, on a secondary basis, the same frequencies as does the PLMS. In this service, the frequencies are intended primarily for use in rendering public message service, between Rural Subscriber and Central Office stations and to provide radio trunking facilities between central offices. Central office and interoffice station frequencies are allocated only to wireline carriers. RCCs are permitted to use subscriber station facilities which operate through the RCC base station, where the use of wire telephone lines is not practicable or feasible and upon a showing that it will not degrade the mobile communication service rendered by the base station. Rural subscriber stations are normally authorized to communicate with and through the central office station with which they are associated.

[28] The secondary basis status requires that rural radio service be offered on an interference-free basis to stations in the PLMS. Thus, if a primary station is located close to a secondary station and harmful interference occurs as a result, the secondary station could be ordered to cease operations.

applications for rural radio systems would be granted to operate only on a secondary, non-interference basis. To encourage RCCs to serve rural subscribers, we proposed to amend Section 22.601 to permit RCCs to construct and operate central office stations. In addition, in order to protect the future needs of the public for rural radio service, we proposed to require those RCCs which utilize the former wireline frequencies to provide rural radio service where requested in addition to any other service they may provide. These proposed changes were intended to alleviate concerns that the Rural Radio service would be "bumped" by elimination of the fence. *Notice, supra* at 840. We also proposed to require more detailed technical showings from Rural Radio applicants.[29]

22. Telocator supports the proposals for the Rural Radio Service but objects to the proposal to limit the ability to apply for interoffice stations to wireline carriers (proposed §22.601(b), note). It asserts this is an inappropriate restriction on RCC use of the spectrum. USTA contends there is an apparent inconsistency between the proposal to grandfather existing rural radio operations but require a substantial degree of technical data from future applicants,[30] with future grants continuing to be on a secondary basis. USTA also asserts that a case could be made for retaining the fence for the purpose of rural radio service licensing, as a means of protecting the essential services using these frequencies and insuring their future availability.[31]

23. We conclude that our proposal to eliminate the fence, while protecting the rural radio service, will serve the public interest. We are sensitive to USTA's arguments in favor of the fence. However, we are convinced that the approach we have taken effectively protects the rural radio service. To this end, we are grandfathering existing rural radio systems to operate on a primary basis instead of a secondary basis; we are also requiring radio common carriers who use former wireline frequencies to provide rural radio service where requested in addition to any other

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[29] We proposed that rural radio applicants be required to submit a frequency search of all co-channel stations within the radius specified in Section 22.15(b) from the proposed base/central office/subscriber/interoffice/relay station, including information concerning height above average terrain and effective radiated power. *See* Sections 22.15(b), 22.115, 22.505 and 22.506. Additionally, applicants would be required to submit a showing of interference-free operation for the proposed station. *See* Section 22.15. We proposed to require Rural Radio stations to comply with antenna height-power limits found in part 22 of the Rules. *Id.* at 841.

[30] USTA questions whether as a practical matter, frequency searches, interference-free showings and ERP data, are really necessary in the Rural Radio Service. These showings are not now required, and would not be needed if rural radio use of the frequencies remains limited to wireline carriers.

[31] USTA further argues that where rural radio is used by wireline carriers to serve remotely located subscribers, a strong case can be made for the overriding importance of this essential communications service.

service they may provide. We are convinced that rural radio need not be "bumped" with elimination of the fence and we have taken all necessary steps to guarantee this. We agree with USTA, however, that it would be burdensome to require Rural Radio applicants to file interference showings. These showings are not necessary in all cases. Accordingly, we will reserve the right to require this information on a case-by-case basis. Also, all future Rural Radio applicants are required to comply with antenna height-power limits found in Part 22 of the Rules. *See* new Section 22.609(c). Further, we have adopted Telocator's suggestion that interoffice stations not be limited to wireline common carriers, as we had proposed. An RCC proposing to provide rural radio service should be given access to all of the frequencies listed in Section 22.601 on the same basis as a wireline carrier. With these modifications, we are adopting the rules as proposed. We intend to monitor the development of the rural radio service and we anticipate that any problems that may develop will be brought to our attention quickly and we will take further appropriate action.

24. *Petitions for Reconsideration in CC Docket No. 80-57.* In our rulemaking to revise Part 22, we adopted an interim policy permitting RCC applications for wireline frequencies, accompanied by a waiver request, to be maintained on file pending the outcome of our rulemaking to eliminate the fence. 95 FCC 2d at 825.

25. Three petitions for reconsideration of this decision were filed. See Appendix B. They request that the Commission reverse its decision and dismiss RCC applications requesting waivers that were filed during the interim period specified in the policy.

26. Some petitioners contend that the interim procedures have a substantial negative impact on wireline eligibles who have developed business plans based upon the existing separate allocation system, and that proper notice was not given for the interim waiver policy; they object to the fact that the waiver policy, which became effective on February 27, 1984, applies to applications filed at any time after July 29, 1982, the adoption date of the Notice of Proposed Rulemaking.[32] One petitioner argues that the interim procedures are improper in that they drastically change the *status quo* by permitting the acceptance of applications by carriers ineligible under existing rules.[33]

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[32] One petitioner argues that the retroactive interim waiver policy disadvantages those RCCs who did not file waiver applications during the pendency of the rulemaking.

[33] One petitioner also argues that subjecting wireline applications to competitive filings under the waiver policy is contrary to the public interest; it argues that at a minimum the Commission should not permit non-wireline carriers to file waiver applications for a change in frequency that are mutually exclusive with wireline applications.

27. Commenters opposed to these petitions argue that the interim procedures should be made applicable to requests for frequency changes, because the wireline guardband frequencies, which are available in some markets, provide better quality service than low band frequencies, and that accordingly it is in the public interest to allow RCCs to switch from a low band channel to an unused wireline guardband channel if possible. Supporters of the waiver policy argue that the interim procedures do not contravene the notice and comment requirements of the Administrative Procedure Act.

28. We will deny the petitions for reconsideration. As we stated at the time we adopted the interim policies, "we believe these procedures effectively safeguard the public interest and prevent the possibility that elimination of the fence will *de facto* be irrelevant because all frequencies have been assigned in the interim." 95 FCC 2d at 825-26. The acceptance of waiver applications to be held in pending status until the Commission has had an opportunity to determine whether to retain or eliminate the fence was a reasonable way to permit carriers to begin the application process. Wireline applications for expansion of existing systems or frequency changes have no greater claim to immunity from competing applications than non-wireline applications. The purpose of a waiver provision is to permit the filing of applications that may not be consistent with existing rules but may nevertheless serve the public interest. In the instant proceeding, an announced policy of permitting the filing of applications with a waiver request was a proper means for accommodating applicants who would otherwise be barred by a rule the basis for which had been called into question as the result of the maturing of the industry.[34]

29. We disagree with petitioners' arguments that the interim policies violate the Administrative Procedure Act for lack of proper notice and comment. When the interim procedures were established applicants had long been on notice of the limited waiver proposal and had ample opportunity to comment on the proposal. While the waiver policy differed from the proposal, it did so because of input gathered from participants in the rulemaking during the comment process. Under Commission rules parties have always been able to file applications and request waiver of the rules. *See* Section 1.3 of the rules. Even in the absence of an announced interim policy, applications properly filed with a waiver

[34] *See* KCST-TV, Inc. v. FCC, 699 F. 2d 1185, 1194-95 (D.C. Cir. 1983) (FCC is obliged to entertain requests for waiver when basis for rule is no longer valid). When the factual predicate for a rule is not necessarily invalid but the policy embodied in the rule is undergoing reexamination, as is the case here, the Commission has substantial discretion in acting on waiver requests. Thomas Radio, Inc. v. FCC, 716 F. 2d 921, 925 & n.21 (D.C. Cir. 1983).

request, will not be dismissed unless the waiver is denied. The interim policy merely stated how the Commission intended to process these applications pending a determination on the waiver requests in this proceeding.

30. The interim standards were a reasonable exercise of our discretion. Had we not adopted the interim policies there was a strong probability that our proposed rulemaking would have been a nullity because wireline carriers could have made a last-ditch attempt to preempt use of the remaining unused frequencies by nonwirelines. Accordingly, we will deny the petitions for reconsideration. In light of our decision to eliminate the fence, we will begin processing applications which were filed in accordance with our previously established interim policies.

Regulatory Flexibility Act - Final Analysis

31. *Need for Rules and Objective.* The rule adopted eliminate unnecessary regulation and policies and provide service to the public in the most efficient, expeditious manner possible.

32. *Issues Raised by the Public In Response to the Initial Analysis.* None

33. *Alternatives that would lessen impact.* None

Ordering Clauses

34. Authority for this rulemaking is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), 303(4), and Section 553 of the Administrative Procedure Act, 5 U.S.C. §553.

35. Accordingly, IT IS ORDERED, That part 22 of the Commission's Rules and Regulations is amended as specified in Appendix C, effective January 17, 1985.

36. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed in CC Docket No. 80-57 by T-Com, Inc., Telephone and Data Systems, Inc. and Schwartz, Woods & Miller ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendices A& B-may be seen in FCC Dockets Branch, 1919 M Street, N.W. Wash., D.C.

Appendix C

Final Rule

47 CFR Part 22 is revised as follows:

1) Section 22.40 is amended by revising paragraph (a) to read as follows:

22.40 *Considerations involving transfer or assignment applications.*

(a) *Applicability.* This section applies to all authorizations issued under this Part, except those for exclusive paging frequencies, and to all authorizations obtained as a result of a comparative hearing if the facility has been operated for less than one year.

* * * * *

2) Section 22.501 is amended by removing paragraph (i)(2), (i)(3) and (i)(4) and revising paragraphs (b), (c), (h), (i) and introductory language in paragraph (k) to read as follows:

§22.501 *Frequencies*

* * * * *

(b) For assignment to common carriers for two-way public land mobile service. One-way public land mobile service may also be furnished, provided that two-way service is offered.

Base station frequencies (MHz):	Mobile dispatch, and auxiliary test station frequencies (MHz)
152.03	158.49
152.06	158.52
152.09	158.55
152.12	158.58
152.15	158.61
152.18	158.64
152.21	158.67
152.51*	157.77*
152.54*	157.80*
152.57*	157.83*
152.60*	157.86*
152.63*	157.89*
152.66*	157.92*
152.69*	157.95*
152.72*	157.98*
152.75*	158.01*
152.78*	158.04*
152.81*	158.07*
454.025	459.025
454.050	459.050
454.075	459.075
454.100	459.100
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250
454.275	459.275
454.300	459.300
454.325	459.325
454.350	459.350
454.375*	459.375*

454.400*	459.400*
454.425*	459.425*
454.450*	459.450*
454.475*	459.475*
454.500*	459.500*
454.525*	459.525*
454.550*	459.550*
454.575*	459.575*
454.600*	459.600*
454.625*	459.625*
454.650*	459.650*

(c) All applicants who apply for frequencies listed in (b) with an asterisk must provide rural radio service when requested in addition to any other service that they will provide.

* * * * *

(h) *150 MHz band (paging).* The following frequencies may be used exclusively in providing paging.

152.24 MHz
152.84 MHz
158.10 MHz
158.70 MHz

(i) *450 MHz band (control, repeater).*

(1) The frequencies in this paragraph may be assigned for use for control or repeater stations. Series operation of more than one control or repeater station is not permitted.

Control station frequencies (MHz):	Repeater station frequencies (MHz)
454.025	459.025
454.050	459.050
454.075	459.075
454.100	459.100
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250
454.275	459.275
454.300	459.300
454.325	459.325
454.350	450.350
454.375	459.375
454.400	459.400
454.425	459.425
454.450	459.450
454.475	459.475
454.500	459.500
454.525	459.525

454.550	459.550
454.575	459.575
454.600	459.600
454.625	459.625
454.650	459.650

(2) *Power.* Effective radiated power shall not exceed 150 watts.

(3) *Interference, secondary basis*

The use of the frequencies by a control or repeater station shall not cause harmful interference to any other station authorized to use such frequencies and shall be on a secondary basis to the provision of mobile and rural radio service by other classes of stations.

(j) [Reserved]

(k) *470-512 MHz band (Two-Way)*

The following frequencies may be assigned to common carriers within the listed urban areas:

Base station frequencies (MHz)	*Mobile frequencies (MHz)*

* * * * *

3. Section 22.601 is amended by revising paragraphs (a) and (b) to read as follows:

§22.601 *Frequencies.*

(a) *General.* The following frequencies are available on a secondary basis in the rural radio service, provided no harmful interference is caused to stations in the Public Land Mobile Service.

(b) *Frequencies.*

Central office and interoffice station frequencies (MHz)	Rural subscriber and interoffice station frequencies (MHz)
152.03	158.49
152.06	158.52
152.09	158.55
152.12	158.58
152.15	158.61
152.18	158.64
152.21	158.67
152.51	157.77
152.54	157.80
152.57	157.83
152.60	157.86
152.63	157.89
152.66	157.92
152.69	157.95
152.72	157.98
152.75	158.01
152.78	158.04
152.81	158.07
454.025	459.025
454.050	459.050

454.075	459.075
454.100	459.100
454.125	459.125
454.150	459.150
454.175	459.175
454.200	459.200
454.225	459.225
454.250	459.250
454.275	459.275
454.300	459.300
454.325	459.325
454.350	459.350
454.375	459.375
454.400	459.400
454.425	459.425
454.450	459.450
454.475	459.475
454.500	459.500
454.525	459.525
454.550	459.550
454.575	459.575
454.600	459.600
454.625	459.625
454.650	459.650

Note 1: Rural stations licensed as of the effective date of the adoption of final rules in this proceeding will be allowed to provide rural radio service on a primary basis (grandfathered).

(1) *Relay Stations.* The frequencies in paragraph (b) in this section may be assigned to relay stations upon a showing why it is impracticable to achieve the required communications without relay stations.

* * * * *

4. Section 22.609 is revised to read as follows:

§22.609 *Supplementary Showing Required with Applications for Rural Radio facilities*

(a) Each application in this service shall be accompanied by a showing why it is impracticable to provide the required communication service by means of wireline facilities.

(b) Additionally where it is proposed to provide a rural subscriber service through a base station, a showing should be made that the proposed rural subscriber service will not adversely affect the availability or adequacy of service to mobile subscribers.

(c) Applications shall contain calculations of the effective Radiated Power demonstrating compliance with the limits set forth in Sections 22.505 and 22.506.

(d) Only if requested by the Commission the following information may need to be submitted:

(1) The showings required by §22.15(b), co-channel interference study and an interference study demonstrating that the proposed facility will not cause

harmful electrical interference to those co-channel facilities identified in §22.15(b);

(2) Height above average terrain. *See* §22.115.

Application, Incomplete
Lottery
Notice, Sufficiency of

Application for review denied. Low power TV/TV translator applications that do not contain required certifications are not complete and, therefore, not acceptable for filing. *Lottery Report and Order,* 93 FCC 2d 952 (1983) provided adequate notice to potential applicants the need to file certain supplemental certifications. Random selection process is now used, therefore, maximizing the number of applicants is no longer a goal in order to seek the most qualified applicant. —*Rochelle C. Salzer*

FCC 84-455

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

Rochelle C. Salzer, John M. Enomoto, Paul D. Lee, Earl S. Robinson, Eleanor Gagudan, Klayton A. Ko, Lora L. Burbage, Maritess Cristobal Clark, Greg C. F. Lee, Odelle Sapp, Roger D. Schmidt, Gary M. Zupkas, Edward Robello, Joseph W. Robinson, Lisa Savitski, Barbara Seleni, Rochelle K. Sepulveda, Bruce Spencer, Terry Lee Stam a/k/a Tung Sing Lee, Henry Suzuki, Samuel G. S. Tam, John L. Trusdell, Jr., Gary S. Viverios, Faredah Shamsudin Ward, Mary Lou Watumill, Malcolm B. Wright, Woodrow Yasuhara, William M. Beardsley, Karen L. Clark, Donna Y. Flores, Harry R. Glidden, Marceline M. Green, Wendell Hope, George W.L. Krueger, Joseph K. Malina, Peter T. Mashimo, Kent E. Mathieu, Herbert T. Matsunaga, Mitsue Murakami, William F. Remular, Donald Y. Narimatsu, Helen Risk, Russell S. Pang, and Brandan Pastienipo

File Nos. BPTVL-831013P0-QV and RG-RP

For Construction Permit for New Low Power Television Station Channel 7, Honolulu, Hawaii

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: October 1, 1984

BY THE COMMISSION:

1. We have before us a February 17, 1984, Application for Review[1] of a January 20, 1984, Mass Media Bureau decision filed by the above-captioned individual applicants for a new low power television station on channel 7 at Honolulu, Hawaii. Each of these identical 44 applications was filed on October 13, 1983, in response to an "A" cut-off list, Report No. 83-3, released September 13, 1983. Each of the applications was returned as unacceptable for filing because it lacked the required supplemental certifications and, thus, was incomplete. Applicants' request for reconsideration was denied by the Chief, Mass Media Bureau, on January 20, 1984. The applicants request review of the staff action returning the applications based on two premises: (1) that there was not adequate notice of the requirement to file certifications with low power television applications and (2) that the Commission action returning the applications was inequitable or unfair.

2. The applicants claim that the Commission did not give proper notice of the necessity for filing a supplemental certification to the required FCC Form 346. They state that since the Commission's August 19, 1983, Public Notice, *Required Supplement to Low Power Television/Television Translator Construction Permit Application*, Mimeo No. 6030, was not published in the Federal Register, applicants were not put on notice of the necessity for filing the supplement.

3. Notice of the changes in the low power television application form was published in the Federal Register on June 13, 1983, *Selection From Among Competing Applicants*, ("*Lottery Report and Order*") 93 FCC 2d 952 (1983) [48 Fed. Reg. 27182]. While it is correct that the verbatim text of the revised FCC Form 346 was not published in the Federal Register, notice of the revision was published. Section 552 of the Administrative Procedure Act does not require a form to be printed verbatim but only that an agency publish "descriptions of the forms

[1] A motion for consolidation was filed on August 17, 1984, on behalf of several other applicants whose March 8, 1984, applications were returned for failure to submit the required certifications. Since the other applications involve different parties and somewhat different factual situations, and since consolidation is discretionary, we will not consolidate the other applications with this proceeding.

available or the places at which forms may be obtained." 5 U.S.C. §552 (a)(1)(c) (1981). Paragraph 51 of the *Lottery Report and Order* specifically addressed the changes in the low power television application form:

> The preference system being adopted in this *Report and Order* requires the submission of additional information on ownership characteristics and various other certifications by those who have already filed LPTV applications. Form 346, the application for LPTV construction permits, is being amended to reflect the new information requirements. *See* Appendix D. When an application now on file is placed on an "A" cut-off list, the applicant will be permitted to amend to provide only the newly required information, as requested on the new Form 346, until the "A" cut-off date. *New mutually exclusive applications filed in response to the "A" list will be required to comply with all rules and policies in effect, as reflected in the new form.* (Emphasis added).

4. The summary of Appendix D to the *Lottery Report and Order*, that was published in the Federal Register,[2] clearly set forth the certifications which were required by all applicants for low power television facilities. The required certifications related to multiple applications and real party in interest as well as minority and diversification preferences. The certifications were set forth in sufficient detail in Appendix D so that an applicant would fairly be advised as to the information required to be submitted with new applications. Furthermore, the August 19, 1983, Commission Public Notice reiterated the requirement for filing certifications which had been previously published in the Federal Register.

5. The applicants assert that the applications did not warrant dismissal pursuant to the provisions of Section 73.3568 of the Commission's Rules. However, the applications were not dismissed since they were never accepted for filing. The applications were returned as unacceptable for filing since they were not complete and were, therefore, defective. Thus, Section 73.3568 of the Commission's Rules is not applicable. Rather, Sections 73.3564 and 73.3566 govern. Section 73.3566 states that applications determined to be patently not in accordance with the FCC rules, regulations or other requirements will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. In addition, Section 73.3564 states that low power television and television translator applications that are not complete will be returned to the applicant.

6. The applicants further state that the applications which were returned were substantially complete when filed. However, in their

[2] The *Lottery Report and Order* released by the Commission on May 27, 1983, (FCC 83-114) contained a complete copy of FCC Form 346, including the certifications and instructions, in Appendix D. The document which was published in the Federal Register contained a summary of the certification requirements in Appendix D, and a statement at 48 Fed. Reg. 27200 that copies of the document including Appendix D, which contained the complete Form 346, with certifications, were available at various specified locations.

Application for Review, the applicants recognize that the standard for accepting low power television applications is not "substantially complete" but is "complete and sufficient." *LPTV Report and Order*, 51 RR 2d 476 (1982). The quotation cited, by the applicants, from paragraph 51 of the *LPTV Report and Order*, demonstrates that the "substantially complete" standard of *James River Broadcasting Corp. v. FCC*, 399 F.2d 585 (D.C. Cir. 1968), is no longer used for low power television applications. Moreover, the portion of paragraph 51 which the applicants did not quote continues:

> It is open to us to modify our acceptability standards as they apply to low power and translator applications, so long as we do so explicitly and with good reason: 'There is also an interest in procedures and administrative techniques that enable the Commission to handle its work load efficiently, and with optimum use of limited administrative resources. Perhaps the Commission can accommodate the various interests by adopting administrative expedients that, for example, explicitly require all applications to be letter-perfect when filed.' *Radio Athens, Inc. (WATH)* v. *FCC*, 401 F.2d 398 (D.C. Cir. 1968). We now do so for the following reason. The Commission's limited resources and the large number of low power applications to be processed simply will not permit the staff to coach applicants in correcting defects or omissions in applications that have been filed, as sometimes has been the case in the past. Defective low power applications will be returned summarily, and if they are resubmitted with perfecting amendments, they will be placed at the end of the processing line, unless passage of a cut-off date precludes consideration altogether, in which case the resubmission will be returned.

Applicants have thus been on notice of the acceptance standard to be used for low power television applications from the time the *LPTV Report and Order* was issued.

7. The cases which the applicants cite to support their contention that the Commission's action was drastic are inapplicable in this situation. Those cases involved applications where the substantially complete standard was applied. However, since letter perfect low power television applications are required, the staff may properly return a defective application. Moreover, all applicants similarly situated are treated the same, since all defective low power television applications are being returned. The applicants' reference, in Attachment A of their Application for Review, to a low power television application filed in March of 1981, which was afforded an opportunity to file a supplemental certification, does not indicate unequal treatment. That application was filed before certifications were required. Furthermore, in the *Lottery Report and Order* the Commission stated that it would give applicants that had filed prior to the effective date of the lottery rules an opportunity to submit the required certifications. The Commission was merely allowing pending applicants to supplement their applications with the newly required information.

8. The applicants claim that since they filed their applications without the assistance of counsel they should not be penalized for the omissions. All applicants are expected to be familiar with and comply with the Commission's rules. Further, acceptance of the applications as requested would prejudice nine other applicants that have timely filed complete and sufficient applications for channel 7 in Honolulu.

9. The applicants contend that dismissal of their applications is repugnant to the Commission's policy which seeks to have a choice of as many qualified applicants as possible. *Azalea Corp.*, 31 FCC 2d 561 (1971); *but see Green Country Mobilephone, Inc.*, 55 RR 2d 1619, 1622 (1984). This policy was relevant when a comparative choice was made from among applicants in a hearing proceeding. However, in the low power television and television translator service the Commission no longer awards authorizations based on a comparative evaluation of the applicants' qualifications. Lotteries are now used to award low power television and television translator construction permits. Because of this random selection process the "most qualified" applicant is no longer sought in a comparative hearing. Strict application acceptance standards insure that minimally qualified applicants are included in lotteries. Therefore, maximizing the number of applicants is no longer a goal in order to seek the "most qualified" applicant. There are nine other applicants for channel 7 in Honolulu, Hawaii. This number is more than adequate to provide a qualified applicant.

10. Significantly, Congress, in amending the Communications Act to permit the use of a random selection method, acknowledged the potential for filing abuses and directed that all applicants certify that they are the real party in interest and intend to build and operate the proposed station and that the application is not being filed with an intent to sell the authorization. Conf. Rep. No. 756, 97th Cong., 2d Sess. 39 (1982). Therefore, it is fundamental that the real party in interest certification must be completed as part of the application form. Further, the multiple applications certification directly relates to efficient processing. It is especially effective against mass filers since it requires the certification by an applicant that the applicant has not filed applications mutually exclusive with itself. As explained in the *Lottery Report and Order*, 93 FCC 2d 952 (1983), this helps to prevent "stuffing the ballot box" in the lottery process. As such, the multiple applications certification is a necessary part of the application which contributes to more expeditious processing.

11. Strict enforcement of the complete and sufficient standard for low power television and television translator applications is necessary in order to provide prompt and accurate processing of applications. Pursuant to our processing procedures, as soon as mutually exclusive applications

are identified, they are reviewed for the minority and diversity certifications. Specifically, the certification requests information as to minority status, including a list of the minority principals and their respective ownership interests. A two to one preference is given to a minority applicant. A two to one preference is also awarded to those applicants with no other mass media holdings. A more limited preference is awarded to those with majority ownership interests in one to three media of mass communications. This information is entered into a computer program designed especially to facilitate the lottery process. The program, using the formula set forth in the *Lottery Report and Order, supra*, calculates the relative preferences for each applicant. A "B" or Lottery Notice list is produced, which sets forth all lottery participants and indicates what preferences, if any, have been awarded. The B list must be issued 30 days before a lottery. If the necessary information is not incorporated in the application as required, the entire process is considerably delayed.

12. It should be noted that there were several thousand applications on file when the lottery rules were implemented. Because many of these applications were to be dismissed for technical deficiencies and because of the time involved in logging and filing amendments, we decided not to secure all the certifications at the same time. Instead, after a group of mutually exclusive applications is identified, we request the certifications by letter from each applicant, providing a period of 15 days for response. Although, under the circumstances, this was the most feasible approach, the acquisition of lottery certifications in this manner has considerably delayed the process.[3] As a result, we require that all applications filed after adoption of the lottery rules contain the required certifications. Further, the above-referenced August 1983 Public Notice was issued to highlight the necessity for this information.

13. Considering the thousands of low power television and television translator applications filed, the strict acceptance standards applicable to the service must be enforced. Applications that omit the required certifications must not be permitted to delay the process. Even if considered minor in terms of a particular application, this deficiency or omission, when it occurs in hundreds of applications, becomes a major stumbling block in the processing flow. Further, the delay that results is not just to the incomplete applications but to all mutually exclusive applicants involved in the same daisy chain.[4] Thus, if the complete and

[3] During the amendment period, which permitted the filing of amendments to conform applications to the new rules, processing came to a halt so that all staff resources could be devoted to logging and filing the massive influx of paper. We wish to avoid such a result in this case.

[4] One application may link additional applications into a mutually exclusive group or require the return of others non-timely filed with the lead cut-off application. *See Kitty Hawk Broadcasting*, 7 FCC 2d 153 (1967).

sufficient standard is not observed, so much time will be devoted to reprocessing deficient applications (waiting for corrective amendments, adjusting the engineering data base with modified information and altering groups of mutually exclusive applications as engineering information is changed) that the issuance of construction permits and the actual implementation of the Low Power Television service will be substantially impeded.

14. In summary, all potential applicants received notification by the *Lottery Report and Order* in June 1983 and highlighted by Public Notice in August 1983 that an application in order to be complete and sufficient must include minority, diversity, multiple applications and real party in interest certifications. By failing to supply the required information these applications would severely prejudice processing with respect to those applications already on file and appearing on the cut-off list.

15. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by the 44 applicants IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of the *Memorandum Opinion and Order* by Certified Mail- Return Receipt Requested to the attorney for the applicants named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO

Comparative Issue, Contingent
Frequency, Equitable Distribution of Under 307(b)
Ownership and Management, Integration of
Proposal Effectivation of

Review Board holds that dispositive Section 307(b) preference should not be given where needs showing is inadequate and favored community has population of only 752 persons, and grants construction permit under contingent comparative issue to applicant that has best ownership integration proposal.
—*Ruarch Associates*
MM Docket No. 83-843

FCC 84R-73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates Woodstock, Virginia	MM Docket No. 83-843 File No. BPH-820331AH
All Kountry Music Broadcasters, a Partnership Edinburg, Virginia	MM Docket No. 83-845 File No. BPH-820908AH
For Construction Permit for a new FM Station	

Appearances

Robert G. Allen and *Leonard S. Joyce*, on behalf of Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates; *Harry G. Sells*, on behalf of All Kountry Music Broadcasters, a Partnership; and *Arthur I. Steinberg*, *Stephen T. Yelverton*, and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: October 10, 1984; Released: October 18, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This is the latest in a series of cases arising under Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), in which mutually exclusive broadcast applications for nearby communities are pitted against each other to determine which proposal will best provide a fair, efficient, and equitable distribution of radio service (choice among communities) or, if no decisive community choice can be made, which applicant will best serve the public interest (comparative choice among applicants). Here, Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates (Ruarch) and All Kountry Music Broadcasters, a Partnership (All Kountry) are vying for authority to construct a new FM station on Channel 240A at Woodstock or Edinburg, Virginia, respectively. By Hearing Designation Order, 48 Fed. Reg. 39294, published August 30, 1983, these applications (and one other that was subsequently dismissed at the applicant's request) were designated for hearing on the aforementioned Section 307(b) and contingent comparative issues. In an Initial Decision (I.D.), FCC 84D-25, released April 17, 1984, presiding Administrative Law Judge Walter C. Miller (ALJ) awarded All Kountry a dispositive Section 307(b) preference and granted its application. We have reviewed the I.D. in light of the applicants' exceptions, replies, and supplemental pleadings, the oral argument held August 10, 1984, and our examination of the record. The Board adopts the findings of fact and conclusions of law in the I.D., except as modified herein, but disagrees that a decisive Section 307(b) preference is warranted and grants Ruarch's application under the contingent comparative issue.

2. *Section 307(b) issue.* Every community of "appreciable size," *Plainview Radio*, 24 FCC 405, 421, 15 RR 363, 381 (1958), is presumed by the Commission to need at least one radio station for local self-expression. *Bie Broadcasting Co.*, 81 FCC 2d 1, 26, 48 RR 2d 471, 491 (Rev. Bd. 1980), *rev. denied*, FCC 81-376, released July 31, 1981; *Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 54 RR 2d 923 (Rev. Bd. 1983), *rev. denied*, FCC 84-284, released June 19, 1984. Indeed, the United States Court of Appeals for the District of Columbia Circuit has held that "[l]ocal transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations." *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977). However, this presumption does not result in an automatic preference and must be weighed against any countervailing factors. *Bie Broadcasting Co., supra.* In other words, the presumption is rebuttable, or, as the court put it in *Harrell* v. *FCC*, 267

F.2d 629 (D.C. Cir. 1959), the Commission must still make a determination of the relative needs of the communities and the relative abilities of the applicants to meet those needs.

3. In the instant case, the incorporated towns of Woodstock and Edinburg are separate communities,[1] located about five miles apart, in Shenandoah County, Virginia. Woodstock is the county seat and had a 1980 population of 2,627; Edinburg's population was 752. Edinburg has no daily or weekly newspaper and no radio or television stations licensed to it. On the other hand, Shenandoah County's one weekly newspaper is located in Woodstock, as is fulltime AM Station WAMM.[2] I.D., Findings, paras. 8-13. The towns have political, cultural, religious, social, and commercial attributes commensurate with their relative sizes, except that Woodstock is also the site of the county hospital and the county library. *Id.* In addition, however, All Kountry concedes that Woodstock is the "center of commerce and industry in Shenandoah County," Tr. 181, and the population of Woodstock increased by 12.4% between 1970 and 1980 while the population of Edinburg declined by 1.8%.

4. At oral argument the applicants stipulated (Tr. 354-56) that their respective engineering proposals would yield no significant differences in the areas and populations covered or the number of reception services available.[3] This stipulation mooted the reception service or "efficiency" aspect of the Section 307(b) analysis and leaves only the transmission aspect — *i.e.*, which community (if either) has the greater need for its own local radio outlet. On this matter Ruarch argues that the ALJ's grant of a dispositive transmission preference to All Kountry was based totally on

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[1] Ruarch feebly challenges Edinburg's distinctness as a community for Section 307(b) purposes in its Brief at 27 and 39 by noting its smallness and asserting that its identity has been "essentially merged" with Woodstock's because of Woodstock-provided services. However, these charges lack precedential support in the face of the ALJ's findings of uniqueness, I.D., paras. 11-13, and the Commission has held that a community with a population as small as 660 is a separate community under Section 307(b). *Musical Heights, Inc.*, 29 FCC 1, 19 RR 49 (1960). *See also Seven Locks Broadcasting Co.*, 37 FCC 82, 3 RR 2d 177 (1964).

[2] Ruarch excepts to the ALJ's refusal to take official notice that WAMM's nighttime interference-free contour excludes 5% of Woodstock's land area. Its claim was properly rejected by the ALJ as an inadequately supported attempt to diminish the Section 307(b) significance of WAMM as a fulltime AM station serving Woodstock, even though All Kountry stipulated (Tr. 125) to the 5% figure. See I.D., note 4.

[3] Prior to the stipulation, we (and the ALJ) were confronted with four sets of conflicting engineering data concerning this matter, and the ALJ had rejected most of it because the sponsoring engineering consultants had employed incomplete and inconsistent engineering calculation methods. I.D., note 2. We affirm the authority of ALJs to order joint engineering studies in such circumstances to minimize the areas of disagreement and to ensure that they have the benefit of the best engineering data *available*, not only the best data *in the record. See Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 122 n. 14, 25 RR 2d 135, 139 n. 14 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (Comm'n 1972).

the fact that a grant would mean a first transmission service for Edinburg (versus a second service for Woodstock if Ruarch received the preference) and that the ALJ failed to make the type of full community needs analysis required by *Harrell, supra*, and its progeny. See paragraph 2, *supra.* A proper needs analysis would show, according to Ruarch, that there is a greater need for a first competitive radio service in Woodstock (an FM station to compete with WAMM) than there is for a first local radio service in Edinburg. In support, Ruarch points to the disparity in population size and number of community attributes between Woodstock and Edinburg and asks the Board to infer a greater Woodstock need from that disparity. It also questions whether a community of only 752 people can obtain a dispositive Section 307(b) preference in a comparative hearing case.

5. It is hornbook law that where two communities are both seeking a first local transmission service, the Commission presumes that the most populous community has the greatest need for the first service, provided that it has commensurately greater civic, cultural, religious, social, and commercial attributes. *E.g., Affinity Communications, Inc.*, 56 RR 2d 510 (Rev. Bd. 1984). However, where, as here, a transmission service disparity already exists, a different presumption applies, namely that the community which has no transmission service has a greater need than the community that already has one (or more). *Pasadena Broadcasting Co., supra.* In both instances, the presumption of need is rebuttable, and even the presumed "winner" must make a needs showing. *Harrell, supra.* Historically, it is not without precedent for the presumption of need to be rebutted by a larger community with an existing local transmission service against a smaller community lacking such a service. *See Cherokee Broadcasting Co.*, 17 FCC 2d 121, 15 RR 2d 1205 (1969) (community with population of 2235 and two daytime-only AM stations awarded preference over community with population of 1406 and no local service; winning proposal also provided 17,000 more persons with first nighttime service); *Wilmer E. Huffman*, 32 FCC 1, 22 RR 820 (1962) (second daytime service, which was also first nighttime service for more than 9000 people, outweighed smaller community's need for first local service).

6. The record before us is sparse on needs showings by both applicants, apart from the aforementioned standard demographic and sociological data and the differences noted in paragraph 3, *supra.*[4] Moreover, we have not been directed to a single case in which a community with a population of less than 1000 has received a dispositive

[4] For example, there was no testimony by town officials, *Kaldor Communications, Inc.*, 56 RR 2d 137 (Rev. Bd. 1984), or exhibits relating the applicants' programming proposals to either town's need for a local outlet, *see Harrell, supra.*

Section 307(b) preference in a multi-community Section 307(b) situation.[5] While All Kountry urges in its August 17, 1984 memorandum of law on this subject that there are no cases, mandates, criteria, rules, or policies that *preclude* such a preference, we see a distinction between defining a community of "appreciable size" for single community licensing purposes (e.g., *Musical Heights, Inc., supra note 1*) and for mutually exclusive licensing purposes. *Compare Southern Indiana Broadcasters, Inc.*, 24 FCC 521, 531, 15 RR 349, 360 (1958) (Commission asks, without deciding, whether community of 1324 persons is "appreciable" enough to benefit from the first transmission service doctrine), *with Musical Heights, Inc., supra note 1* (Commission asserts in dicta that 1324 persons in *Southern Indiana* case is within scope of needs doctrine, but does not address smaller populations). Under these circumstances, the Board cannot say, as a matter of law, that Edinburg's putative Section 307(b) preference has been adequately supported by a needs showing. Put another way, we conclude that Ruarch has sufficiently rebutted Edinburg's presumptive need for a first local service to preclude awarding it a dispositive Section 307(b) preference. *Cf. Charles Vanda*, 4 FCC 2d 655, 659, 8 RR 2d 427, 434 (Rev. Bd.), *rev. denied*, FCC 66-1013, released November 16, 1966 (Comm'n) (case decided on contingent comparative issue where Section 307(b) differences "not enough . . . to be decisive"). We therefore reverse the ALJ's conclusion that this case should be decided solely on Section 307(b) grounds and turn to the ALJ's treatment of the contingent comparative issue.

7. *Contingent Comparative Issue.* The ALJ only made comparative findings in this case, because of his determinative Section 307(b) conclusions. We shall supply the comparative conclusions. The record evidence shows that Ruarch is a partnership which is 100% owned by Arthur and Virginia Stamler, both of whom will be integrated full-time into station management as general manager and station manager/program director/community relations director, respectively. Its 100% full-time quantitative integration is qualitatively enhanced by the 50% integration of a female (Mrs. Stamler) and by the service area residence of its 100% owners during 35% of the time. (Because this residence is part-time only, it merits less enhancement credit than if it were full-time. *See Thomas C. and Essie L. Collins*, 93 FCC 2d 467, 470, 53 RR 2d 219, 221-22 (Rev. Bd. 1983).) The Stamlers' broadcast and broadcast-related experience began in

[5] All Kountry's reliance on *Kaldor Communications, Inc., supra* is misplaced. The population of the prevailing community there was 1804. While it was asserted that the community had only 300 permanent residents, the Board held that Section 307(b) precedents do not distinguish between permanent and temporary residents. 56 RR 2d at 140. *Musical Heights, Inc., supra note* 1, also cited, is not a multi-community Section 307(b) case and holds only that a community of 660 persons can qualify as a separate entity under Section 307(b).

1951 for Mr. Stamler and 1961 for Mrs. Stamler. While previous broadcast experience has only a "minor" enhancing effect under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1910 (1965), the nature, duration, and 100% ownership aspects of Rauch's enhancement here give it the maximum allowable significance. *See MTF Enterprises*, FCC 84R-69, released October 5, 1984, at para. 9.

8. In contrast, All Kountry claims only 62½% full-time integration (40 hours per week) and 37½% part-time integration (20 hours). However, the ALJ's findings disallow all credit for All Kountry's proposed 37½% full-time integration of Mrs. Audrey 0. Lechman into its station's public service, public affairs, and news activities. All Kountry Exh. 6; Tr. 202-06. We agree with the ALJ that Mrs. Lechman's duties do not constitute a "meaningful management position," I.D., Findings, para. 33, and share his skepticism that Mrs. Lechman (who is 35 years old) and her three children can reasonably be expected to relocate to Edinburg from Bowie, Maryland while her husband will commute back and forth to Washington, D.C. (a three-hour one-way commute), *id.*, paras. 30-33, 35. Thus, we conclude that Mrs. Lechman's duties are non-managerial and also incapable of effectuation, and accord her no integration credit. *See Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 279-80 (Rev. Bd. 1984); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978).[6] All Kountry's remaining quantitative integration credit is enhanced by 37½% part-time credit for an integrated minority principal (Thomas Johnson), 25% full-time credit for future residence (Jacob Ricker), and 25% full-time/37½% part-time enhancement credit for previous broadcast and broadcast-related experience (Ricker and Johnson, respectively). *See New Continental Broadcasting Co.*, 55 RR 2d 413, 416 (Rev. Bd. 1983)(qualitative enhancements attributable to less than full-time integration proposals do not have an equal enhancing effect).

9. Summing up the comparative analysis (there are no grounds for comparison here other than the *Policy Statement's* integration criterion), Ruarch's integration proposal enjoys a clear quantitative edge over All Kountry's (100% full-time credit versus 25% full-time credit and 37½% parttime credit), which cannot be overcome by qualitative factors.[7] *See*

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[6] In its exceptions, All Kountry challenges the ALJ's disallowance of integration credit for Mrs. Lechman on the ground that there is no written or oral evidence impugning her work or future residence commitments. We disagree. Mrs. Lechman's testimony failed to set forth a true managerial role, and her residence commitment is inherently implausible without further explanation. *Cf. WRLJ, Inc.*, 56 RR 2d 287 (Rev. Bd. 1984) (concrete 40-hour-per week out-of-state managerial proposal set forth, including credible weekend commute to be with family).

[7] This would be true even if full integration credit for Mrs. Lechman were restored. Then, the quantitative difference would be 100% full-time credit for Ruarch versus 62½% full-time and 37½% part-time credit for All Kountry, and All Kountry would receive female

New Continental Broadcasting Co., 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (1983). Moreover, Ruarch's net enhancement preferences for female integration, service area residence, and broadcast and broadcast-related experience exceed All Kountry's minority enhancement preference. Thus, we conclude that Ruarch should be awarded an overall substantial integration preference over All Kountry. *See Family Broadcasting Group*, 93 FCC 2d 771, 53 RR 2d 662 (Rev. Bd.), *rev. denied*, FCC 83-559, released November 29, 1983 (Comm'n). Having considered all decisionally significant exceptions and concluding that Ruarch is clearly the comparatively superior applicant, we hold that grant of Ruarch's application will best serve the public interest, convenience, and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the application of Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates (File No. BPH-820331AH) for a construction permit for a new FM station at Woodstock, Virginia IS GRANTED, and the application of All Kountry Music Broadcasters, a Partnership (File No. BPH-820908AH) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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integration and future residence enhancements. Nevertheless, Ruarch's integration edge would still be clear.

FCC 84D-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates Woodstock, Virginia	MM Docket No. 83-843 File No. BPH-820331AH
All Kountry Music Broadcasters, a Partnership Edinburg, Virginia	MM Docket No. 83-845 File No. BPH-820908AH
For Construction Permit for a New FM Station	

Appearances

Robert G. Allen, George Borsari, and *Leonard Joyce* on behalf of Arthur D. Stamler and Virginia I. Stamler d/b/a Ruarch Associates; *Harry G. Sells* on behalf of All Kountry Music Broadcasters, a Partnership; *Stephen T. Yelverton, Norman Goldstein* and *Charles Dziedzic* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: April 11, 1984; Released: April 17, 1984

Preliminary Statement

1. Two applicants remain in this FM proceeding. Ruarch Associates (Ruarch) seeks to operate on 95.9 MHz (Channel 240A) at Woodstock, Virginia at 3 kW (H&V), 102 feet. All Kountry Music Broadcasters (All Kountry) wants to operate on the same Channel at Edinburg, Virginia at 3 kW, 46 feet.

2. The Chief, Audio Services Division designated the case for hearing on August 25, 1983 (48 F.R. 39294, published August 30, 1983). After the interlocutory pleading cycle had run its course, a 47 USC 307(b) issue, a contingent standard comparative issue, and the ultimate conclusionary

issue remained. Those issues read:[1]

(1) To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service;

(2) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest; and

(3) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. The prehearing conference was held on November 18, 1983. Hearing sessions were held on January 23, 1984, and February 27, 1984. The record was closed at the final hearing session. The two applicants, along with the Mass Media Bureau, filed their Proposed Findings of Fact and Conclusions of Law on March 27, 1984. Ruarch and All Kountry filed Replies on April 10, 1984.

Findings of Fact

Issue 1(a) — Areas and Populations

4. As proposed, Ruarch would serve 17,840 people over 378.93 sq. mi. All Kountry would serve 19,559 people over 311.82 sq. mi. Of those served the two would share a common service area of 12,755 people and 256.75 sq. mi. (Ruarch Ex. 9).[2]

5. There are no substantial underserved daytime areas, although Ruarch would bring a fifth aural service to 620 persons (11.04 sq. mi). The following chart shows the areas and populations within the proposed uncommon service area that receives five or fewer nighttime aural services:

[1] In the interest of uniformity and organization the issues have been renumbered. The 47 USC 307(b) is set out first, the contingent standard comparative issue second, and the ultimate conclusionary issue last.

[2] Both Ruarch and All Kountry proffered additional engineering exhibits (Ruarch Ex. 10 and All Kountry Rebuttal Ex. 1). Both were ultimately rejected because the sponsoring engineering consultants had employed incomplete and inconsistent engineering calculation methods (TR. 287-288).

CHART

Number of Nighttime Aural Services

Applicant	2		3		4	
	Area	*Pop.*	*Area*	*Pop.*	*Area*	*Pop.*
Ruarch	21.49	669	31.73	1,198	51.15	2,194
All Kountry	0.32	84	7.57	782	26.35	4,635

6. As the Chart shows Ruarch would bring a 3rd nighttime service to 669 people, a 4th such service to 1,198 people, and a 5th to 2,194 people. All Kountry, on the other hand would only bring a 3rd nighttime service to 84 people and a 4th such service to 782. But it would bring a 5th nighttime service to 4,635 persons. Neither applicant would serve either a daytime or nighttime white or grey area.

7. Based on the engineering data that was accepted, All Kountry would serve about 1,700 more people than Ruarch, and it would bring a nighttime 5th service to about 2,400 more people. However, Ruarch more than offsets these advantages by bringing a 3rd nighttime service to 600 more people than All Kountry, a 4th such service to 400 more people, and a 5th daytime service to 620 people.

Issue 1(b) — The 47 USC 307(b) Demographics

8. *Woodstock, Virginia.* Woodstock had a 1980 population of 2,627 people. It is the county seat of Shenandoah County (population — 27,559). Within the town limits are an elementary school, a middle school, a high school, and a private academy. The Shenandoah County Memorial Hospital (133 beds) is located there. In addition, two additional long-term health care institutions are located there. As a result 52 physicians and 5 dentists practice in Woodstock.

9. Major employers located in Woodstock are the Shenandoah County Government, Blue Bell Apparel Manufacturer, Woodstock Manufacturing Company, First Virginia Bank, Shaffer Egg Processing Plant, and Safeway. The Woodstock Police Department, with seven full-time members, provides police protection; the Woodstock Volunteer Fire Department has 50 members and serves residences beyond the town's boundaries. The Shenandoah County Library is located in Woodstock, and there are 23 churches serving most major denominations. The Farmer's Bank has a branch office in Woodstock. The annual Shenandoah County Fair is held there.

10. Shenandoah County's one weekly newspaper[3] is located in Woodstock. More importantly, for 307(b) purposes, Woodstock has a radio

[3] The only local daily newspaper serving Shenandoah County is located in Strasburg, Virginia.

station licensed to it. Station WAMM operates on 1230 kHz, with a non-directional array, on 1 kW power days and 250 watts at night.[4]

11. *Edinburg, Virginia.* Edinburg had a 1980 population of 752 people. It is located about five miles southwest of Woodstock in Shenandoah County (population — 27,559). Edinburg is part of the Shenandoah County Public School Division. Within the town limits there is a local junior high school — Edinburg Middle School — with 352 students. High school age students primarily attend Central High School in Woodstock. Edinburg owns and operates its own water treatment and distribution system.

12. Edinburg has 33 business places. Major employers located within the Edinburg town limits are the U.S. Forest Service, Alumo Products, Inc.[5] and the Shenandoah Telephone Company. The Farmer's Bank has its main office there. The Edinburg Police Department is made up of a Chief and four officers. The Volunteer Fire Department has 60 members. Only one dentist practices in Edinburg. There are 3 churches and a part-time library. The Edinburg Chamber of Commerce has 63 members.

13. Edinburg does not have either a daily or weekly newspaper. But, more importantly, for 307(b) purposes, there are no broadcast stations licensed to serve Edinburg.

Issue 2 — The Contingent Comparative Issue

14. *Description of the Applicants — Ruarch Associates.* Ruarch is a partnership made up of two equal partners, Arthur D. Stamler and Virginia I. Stamler. The Stamlers are husband and wife, and the partnership is organized under the laws of the Commonwealth of Virginia.

15. *Description of the Applicants — All Kountry.* All Kountry is a general partnership. It consists of three people: Thomas J. Johnson — a 37½% partner; Audrey O. Lechman — a 37½% partner; and Jacob L. Ricker (a/k/a Buddy Allen) — a 25% partner.

16. *Diversification of Mass Media.* Neither Ruarch nor its two principals hold any ownership interest in a broadcast station or any other medium of mass communications. While Ruarch Associates has a pending LPTV application to serve Woodstock, it will dismiss that application if its granted here.[6]

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[4] Ruarch unsuccessfully tried to show that WAMM doesn't cover all of Woodstock at night; but its claim was rejected for the lack of competent (engineering) evidence. In any event, and even if it had presented competent evidence on the point, it wouldn't bear on the outcome of this case one iota.

[5] Ruarch asserts that Alumo Products, Inc. is no longer in business. That assertion is rejected. The transcript reference Ruarch relies on; i.e., Tr. 137 certainly doesn't prove it.

[6] Although this Ruarch representation will not be placed on the 47 USC 307(b) scales, it could be argued that the representation weighs in favor of a grant of All Kountry's application. For if All Kountry is granted, and Ruarch successfully prosecutes its LPTV

17. Thomas Johnson, a 37½% principal in All Kountry has a 33⅓% interest in All Kountry Music Broadcaster's pending application for an AM radio in Virginia City, Nevada. Neither Jacob Ricker nor Audrey O. Lechman — All Kountry's remaining principals — own or have any interest in any broadcast or CATV facility.

18. *Integration of Ownership With Management — Ruarch.* Ruarch claims 100% integration of ownership with management. It bases its claim on both partners being fully integrated into the proposed day-to-day operation of the station.

19. *Arthur D. Stamler.* Ruarch will fully integrate Arthur D. Stamler, a 50% General Partner, into the proposed station's day-to-day operation. Stamler will serve as the station's full-time General Manager. It will be his only employment. As General Manager, Mr. Stamler will supervise the activities of the Station Manager, the Chief Engineer, the Program Director, the Sales Manager, and interns.

20. Stamler presently resides 65% of the time in Fairfax, Virginia, and 35% in St. David's Church (Shenandoah County), Virginia. St. David is 12 road miles from Woodstock and is within the proposed station's primary service area. Regardless of the outcome of this proceeding he intends to become a full-time resident of the Woodstock area. He has lived at his St. David's residence since March 1979.

21. Stamler holds a Bachelor of Arts degree, *cum laude*, in Communication from Boston University, a Masters Degree in Business Administration, and a Ph.D in Communication — both from California Western University.

22. From 1977-1982 Stamler was a regular guest lecturer at the Kogod School of Business, American University, Washington, D.C., and since 1982 he has taught a broadcast and media management course there.

23. Stamler has extensive broadcast and broadcast-related management experience dating back to 1951. From 1951-1954, he served as News Director, Radio Station WHIL, Medford, Massachusetts; and from 1954-1956, he was General Manager of Station WGUY, Bangor, Maine. After a hitch in the Army (1956-1958) as an officer, where he handled public relations and promotions, Stamler became Manager of the Audio Visual Department of the National Association of Broadcasters in Washington, D.C. He held that position until 1961. From 1961-1963, he was Co-founder, 22½% owner, Board Member, and General Manager of Station WHRN, Herndon, Virginia. From 1963 to the present time Stamler has held a controlling interest in, and been President, Director, and Executive

application for Woodstock, then both communities would have a broadcast facility. In fact, Woodstock would then have both a full-time AM station and a low power television station.

Producer of ADS Audio Visual Productions, Falls Church, Virginia. ADS produces public service programming and public service spot announcements for radio and television stations.

24. *Virginia I. Stamler.* Ruarch intends to fully integrate its other 50% General Partner, Virginia Stamler, into the proposed station's day-to-day operations. She will serve full-time as the Station Manager, Program Director, and Community Relations Director. Mrs. Stamler will directly schedule employees, supervise programming, and promote interaction between the radio station and the community.

25. Virginia Stamler, a white female, presently resides 65% of her time in Fairfax, Virginia, and 35% in St. David's Church (Shenandoah County) Virginia. She is married to Arthur Stamler (Findings 19-23 *supra.*). She too intends to become a full-time resident of Woodstock regardless of the outcome of this proceeding. She has lived at her St. David's residence since March 1979.

26. Mrs. Stamler has broadcast experience dating back to 1961. From 1961 to 1963, she was Co-founder, 22½% owner,[7] and Board Member of Station WHRN, Herndon, Virginia. Also from 1961 to 1966 she was the Executive Secretary for the Fairfax City Chamber of Commerce. From 1965-1966 she was the First Director of Public Information for the City of Fairfax, Virginia. There she was responsible for media relations, preparing press releases, and voice reports over WEEL, Fairfax. Since 1963, she has been a co-owner, Vice-President, Director and Creative Associate of ADS Audio Visual Productions, Falls Church, Virginia. See Finding 23 *supra.*

27. *Integration of Ownership With Management — All Kountry.* All Kountry lays claims to a 100% quantitative integration claim. But its own exhibits show that this isn't so. Rather it seeks 62½% full-time integration for Jacob L. Ricker (25%), and Audrey O. Lechman (37½%), and 37½% part-time integration for Thomas J. Johnson.

28. *Jacob L. Ricker.* All Kountry intends to fully integrate Jacob L. Ricker, a 25% partner into the day-to-day operations of the proposed station. Ricker will be All Kountry's General Manager, and will devote at least 40 hours a week to operating and managing the proposed station. Ricker presently resides in Stephens City, Virginia. Stephens City is outside All Kountry's proposed coverage area. He has resided in either Winchester or Frederick County, Virginia over the past 16 years. He will move to the Edinburg area if All Kountry's application is granted.

29. Ricker has been in broadcasting since 1949 and has worked for several broadcast stations between 1949 and the present. He has been a live entertainer, a disc jockey, a commercial salesman, and even did a brief

[7] Mrs. Stamler was a 22½% joint owner of WHRN along with her husband, Arthur Stamler (Tr. 147-148).

stint building and signing-on WKSL-FM, Greencastle, Pennsylvania. Since 1979 Ricker has worked for WFFV-FM, Middletown, Virginia, where he works as a commercial salesman and a disc jockey.

30. *Audrey O. Lechman.* All Kountry claims it will integrate 37½% General Partner, Audrey Lechman, into its day-to-day proposed operation. Mrs. Lechman is the wife of Peter W. Lechman - All Kountry's engineering consultant. Mrs. Lechman, under the direction of the General Manager, says she will devote 40 hours a week to " . . . public service, public affairs, and news" (Tr. 202-204).

31. Audrey Lechman, a white female, was born in Jacksonville, Florida in 1949. She graduated from L.P.N., Nursing School, at Prince Georges General Hospital and was licensed in 1968 to practice nursing in Maryland. She is presently a Nursing Supervisor.

32. Mrs. Lechman resides in Bowie, Maryland. She has been a resident of Prince Georges County, Maryland for the last 23 years. If All Kountry's application is granted, she claims she will move to Edinburg with her three children. If that happens, she says, her husband (Peter Lechman) who works in Washington, D.C. " . . . will probably commute back and forth to work" (Tr. 207). Mrs. Lechman has no experience in broadcast journalism, or public affairs programming.

33. All Kountry's integration claim for Audrey Lechman cannot be credited. In the first place it has failed to show that Mrs. Lechman will have a meaningful management position in the proposed operation.[8] Secondly, she hasn't convincingly demonstrated that she will uproot her deep Prince Georges County, Maryland ties and transplant them to Woodstock, Virginia, if All Kountry is granted.

34. *Thomas J. Johnson.* All Kountry intends to integrate Thomas J. Johnson into its proposed day-to-day operation. After the initial construction Johnson will spend at least 20 hours per week " . . . as a Consultant and Installation Engineer . . . ."

35. Johnson, a black male, was born in Falkland, North Carolina on January 12, 1947. For the past 14 years he has resided in Oxon Hill, Maryland. He intends to maintain Oxon Hill as his primary residence and make the three-hour (one-way) commute to Edinburg to meet his integration commitment.

36. He has a B.S. in electrical engineering and since 1982 has worked as a telecommunications consultant. He is Vice-President of the consulting firm of Lechman, Calligan, and Johnson. Previously he was employed by the FCC, where he started as a broadcast engineer and worked his way up to the Chief of the AM Branch.

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[8] See *Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 393, 395 (1965); and *Chapman Radio and Television Company et. al.*, 19 FCC 2d 157, 170 (R. Bd. 1969).

Conclusions of Law

1. Two mutually-exclusive FM applicant seek authority to operate on Channel 240A (95.9 MHz). Ruarch Associates (Ruarch) would operate at Woodstock, Virginia with 3 kW (H&V) power, at a height of 102 feet. Its opponent, All Kountry Music Broadcasters (All Kountry), would operate at Edinburg, Virginia, with 3 kW power at a height of 46 feet. Two issues, in addition to the ultimate issue, need to be resolved: (1) a 47 USC 307(b) issue and (2) a *contingent* standard comparative issue.

The 47 USC 307(b) Issue

2. The 307(b) issue must be decided first. It is only if 307(b) is not determinative that we turn to the contingent standard comparative issue. See *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955); and Robert J. Reverman et. al., 78 FCC 2d 1110 (R. Bd. 1980);[9] *review denied* FCC 80-739 released December 11, 1980.

3. Under 47 USC 307(b) licenses must be do distributed among communities as to provide a fair, efficient and equitable distribution of radio service. And, as previously noted, where two applicants propose to serve different communities, it becomes a question of community need without regard to the comparative qualifications of the applicants. See *F.C.C.* v. *Allentown Broadcasting Company, supra.*; and *Beaufort County Broadcasting Company*, 54 RR 2d 923 (R. Bd. 1983).

4. We turn first to the "efficiency" aspects of 307(b).[10] All Kountry would serve 19,559 people (311.82 sq. mi.) while Ruarch would serve 17,840 people (378.93 sq. mi.). Neither applicant would serve a "white" or a "grey" area day or night. However, All Kountry would bring a 5th nighttime reception service to 4,635 people (26.35 sq. mi.) as opposed to only 2,194 people (51.15 sq. mi.) for Ruarch.

5. On the other hand, Ruarch would bring a third nighttime service to 669 people (21.49 sq. mi.) and a 4th nighttime service to 1,198 people (31.73 sq. mi.), while All Kountry would only bring a 3rd nighttime service to 84 people (0.32 sq. mi.) and a 4th such service to 782 people (7.57 sq. mi.). In addition, Ruarch would bring a 5th aural daytime service to 620 people (11.04 sq. mi.).

6. On balance (*Cf.* paras. 4 and 5 *supra.*) Ruarch's proposal is slightly more efficient than All Kountry's from the standpoint of reception service. Bringing a 3rd nighttime service to 669 people, a 4th nighttime service to 1,198 people and a daytime 5th service to 620 people more than

[9] Note however that comparative findings have been made. See Findings 14-36 *supra.* It is only comparative conclusions that aren't required. See *WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting Co.*, 30 FCC 932, 21 RR 732 (1961) at Footnote 2; and *Sayger Broadcasting Co.*, 32 FCC 496, 22 RR 1059 (1962) at Footnote 7.

[10] See *Wilmer E. Huffman et. al.*, 32 FCC 1 (1962) and *Cf.* paras. 9-10 with para. 11.

offsets All Kountry's overall and 5th nighttime service superiority. However, Ruarch's off-setting advantage is slight, and is certainly nowhere near being decisionally significant.

7. We turn then to the "fair and equitable" facets of 307(b); i.e., the transmission service aspects. Here All Kountry clearly stands out. All Kountry would bring a first local transmission outlet to Edinburg, Virginia (population - 782), while Ruarch would only bring a second transmission outlet to the larger community of Woodstock, Virginia (population - 2,627 people). Radio Station WAMM is located in Woodstock, and operates on 1230 kHz with a non-directional array at 1 kW power days, and 250 watts at night. So it must be concluded that Edinburg has a greater need for its first outlet of self-expression than Woodstock does for its second such outlet. This greater need is decisionally significant under 47 USC 307(b). See *Beaufort County Broadcasting Company*, 54 RR 2d 923 (R. Bd. 1983); *Lawton-Fort Sill Broadcasting Co.*, 7 RR 1136 (1953); *Plainview Radio*, 31 FCC 259, 21 RR 885 (1961); and *Utica Observer-Dispatch, Inc.*, 11 FCC 383, 3 RR 265 (1946).[11]

Ultimate Issue

8. There is no need to make conclusions on the *contingent* comparative issue, since the contingency never came to fruition. The 307(b) evidence establishes that Edinburg, Virginia has a greater need for its local transmission outlet than Woodstock, Virginia does for its second such outlet. Consequently, a fair, efficient, and equitable distribution of radio facilities under 47 USC 307(b) mandates a grant of All Kountry's application.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, All Kountry Music Broadcasters' application (BPH-820908AH) IS GRANTED; and Ruarch Associates' application (BPH-820331AH) IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

[11] For similar holdings also see *Stephenville Broadcasting Co.*, 22 FCC 998, 15 RR 132 (1957); *Wayne M. Nelson*, 26 FCC 539, 17 RR 356 (1959); *Mercer Broadcasting Co.*, 22 FCC 1009, 13 RR 891 (1957); *Circle Corp.*, 28 FCC 738, 20 RR 231 (1960); and *Walter G. Allen*, 30 FCC 601, 21 RR 497 (1961).

[12] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Common Carrier
Common Carrier, Interconnection, Customer-Provided Equipment
State Action
Telephone Company, Independent

Commission adopted order providing for removal of embedded customer premises equipment owned by Independent telephone companies and tariffed at the state level.
—*Telecommunications Equipment*
CC Docket No. 81-893

FCC 84-483

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

THIRD REPORT AND ORDER

Adopted: October 17, 1984; Released: October 26, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT.

I. Introduction

1. In this proceeding[1] we shall provide criteria and procedures for the

[1] This proceeding was initiated through the release of a Notice of Inquiry on April 13, 1982, 89 FCC 2d 694 (1982) (hereinafter *Notice of Inquiry*). On June 21, 1983, we released a Notice of Proposed Rulemaking, 94 FCC 2d 76 (hereinafter *Notice*). The Report and Order detariffing AT&T's embedded CPE was released on December 15, 1983, 95 FCC 2d 1276 (1983), *reconsideration petitions pending*, Public Notice No. 1445, 49 Fed Reg. 5672 (released Feb. 6, 1984) (hereinafter *Order*). On June 29, 1984, a Second Report and Order was released which detariffed embedded customer premises equipment used in mobile telephone service, FCC 84-269 (hereinafter *Second Order*). A Second Further Notice of Proposed Rulemaking, FCC 84-238, was released on June 20, 1984. (hereinafter *Second Further Notice*). The *Second Further Notice*: (1) suggests several options for a framework under which certain federal agencies may obtain CPE needed for national security and emergency preparedness functions; and (2) proposes and seeks comment on a structure for the detariffing of embedded CPE which is owned by Independent telephone companies and is tariffed at the federal level.

removal of embedded customer premises equipment (CPE) owned by Independent telephone companies and tariffed at the state level[2] from regulated service in a manner consistent with the objectives of the *Second Computer Inquiry*.[3] The framework we adopt here provides maximum flexibility for states to detariff embedded CPE[4] in a manner which addresses the particular circumstances of Independent companies within their jurisdiction. States may develop plans which set, or may approve Independents' plans which indicate: conditions and requirements related to valuation, lease rates and sales prices, price predictability, billing services, maintenance and support, the duration of the transition period, and other similar matters which states find appropriate to accomplish detariffing of CPE.

2. The Commission requires the following with respect to state detariffing: (1) by September 1, 1985, states must certify to the Commission that they have adopted a plan or have taken other steps to ensure detariffing by December 31, 1987;[5] (2) state plans must satisfy the ratepayer vs. investor balancing test established in *Democratic Central Committee*[6] as construed by the Commission in the *Order*; and (3)

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[2] For a discussion of the types of CPE covered by this proceeding, see *Order*, 95 FCC 2d at 4 n.2. This Order disposes of issues relating to the embedded CPE base owned by Independent telephone companies and tariffed by states. For purposes of this proceeding, Cincinnati Bell Telephone Company (CBT) and Southern New England Telephone Company (SNET) are included among the Independent telephone companies.

[3] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further reconsideration*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (hereinafter *CCIA v. FCC*), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 103 S.Ct. 2109 (1983).

[4] For purposes of this proceeding, "embedded" CPE includes "all CPE owned by a carrier, including inventory, which is tariffed or subject to the separations process as of the bifurcation date [January 1, 1983]." *Further Reconsideration Order*, 88 FCC 2d at 513. We have defined "new" CPE as "[a]ny other CPE which is acquired by a carrier or manufactured by an affiliated entity after [the bifurcation date]." *Id.* at 528.

[5] This is the date on which the interstate revenue requirements associated with embedded CPE will be reduced to zero. *See Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Decision and Order, 89 FCC 2d 1 (1982), *appeal docketed sub nom. MCI Telecommunications Corp. v. FCC*, Nos. 82-1237 & 82-1456 (D.C. Cir. Mar. 4, 1982). In CC Docket No. 80-286, the Commission adopted the Popenoe Plan - phasing CPE-related costs out of separations gradually over a five-year period. This was done by freezing CPE investment, maintenance, and depreciation at 1982 levels and reducing this amount to zero in 60 equal steps. As a result, an individual company's interstate CPE - related revenue requirement, as defined by that plan, would remain unchanged by that company's schedule for removing its embedded CPE from its rate base.

[6] The principal rules regarding the treatment of any gains or losses in connection with the removal of utility assets from regulated service are expressed in *Democratic Cent.*

accounting and tax procedures specified in this Order must be followed. State plans, or those developed by Independents and approved by states, must include mechanisms which provide the opportunity for investors to achieve full capital recovery "above the line" before December 31, 1987, the detariffing deadline. Accounting procedures to be used by Independents for the sale of new CPE or CPE transferred out of regulation will be specified in a separate action in this docket.

II. Background

A. Second Computer Inquiry

3. In the *Second Computer Inquiry* we concluded that "CPE is a severable commodity from the provision of transmission services and that regulation of CPE under Title II [of the Communications Act of 1934] is not required and is no longer warranted." *Final Decision*, 77 FCC 2d at 388. We stated in *Second Computer Inquiry* that "the terminal equipment market is subject to an increasing amount of competition as new and innovative types of CPE are currently introduced into the market place by equipment vendors." *Id.* at 439. We also noted that consumers have been able to derive substantial benefits from these competitive forces in the CPE marketplace. *Id.* at 441.

4. We concluded in subsequent rulings in *Second Computer Inquiry* that "continued provision of CPE by common carriers under regulation impedes the evolution of a truly competitive CPE marketplace." *Reconsideration Order*, 84 FCC 2d at 65 (citing *Final Decision*, 77 FCC 2d at 440-46). With regard to detariffing CPE, the Commission decided to deregulate new and embedded CPE separately. *Reconsideration Order*, 84 FCC 2d at 66. The Commission found, as reasonable, an approach which allowed for a bifurcated transition plan that would enable regulators to address separately equipment which is embedded in the separations process and tariffed by the states. New CPE was detariffed on January 1, 1983. Embedded CPE was to be detariffed after the completion of a separate "implementation proceeding" which "will address issues of capital recovery and asset valuation, alternative mechanisms by which transition to an unregulated CPE environment may be achieved, and the appropriate time period for removal of embedded CPE investment from separations and a carrier's rate base." *Reconsideration Order*, 84 FCC 2d at 69.

5. In the *Second Computer Inquiry* decisions, we indicated that states might independently remove embedded CPE from tariffed service.

Comm. v. Washington Metro. Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied sub nom. D.C. Transit Sys. v. Democratic Cent. Comm.*, 415 U.S. 935 (1974) (hereinafter, together with companion cases, referred to as *Democratic Central Committee*). For a listing of companion cases, see *Order*, 95 FCC 2d at 41 n.48.

We stated further that "[w]e continue to believe that the sale of embedded CPE, under state auspices, to subscribers now using such equipment, is an appropriate means of reducing the amount of CPE subject to tariffing and will be helpful in easing the transition." *Notice of Inquiry*, 89 FCC 2d at 696.

B. Notice of Inquiry

6. In the *Notice of Inquiry*, we proposed four possible options which might be used individually or in tandem for detariffing embedded CPE:

(1) The sale of CPE to the subscriber using it;

(2) The transfer of CPE to the carrier's untariffed service or, in the case of AT&T, its sale to a separate subsidiary;

(3) The sale of CPE to a third party;

(4) Allowing the equipment to remain in tariffed service until it is fully retired.

Id. The *Notice of Inquiry* also addressed the issue of procedures for valuation of CPE to be sold or transferred to untariffed service, and discussed accounting issues such as the need to develop accounting procedures for allocating costs between the tariffed activities and activities related to the detariffed embedded CPE. *Notice of Inquiry*, 89 FCC 2d 697-702.

C. Notice of Proposed Rulemaking

7. The *Notice* provided specific proposals for CPE owned by the American Telephone and Telegraph Company (AT&T), but did not propose an embedded CPE detariffing plan for Independents. In the *Notice* we affirmed our tentative view "that the most effective detariffing plan would combine the sale of embedded CPE in place with the transfer of embedded CPE to the carrier's unregulated service. . . ." *Notice*, 94 FCC 2d at 85. In selecting this option for AT&T, however, we recognized that the plan developed for Independent companies "should be sufficiently flexible to accommodate their special circumstances." *Id.* It was our tentative conclusion that Independent companies need not be subject to the same timeframe as AT&T,[7] but that all embedded CPE provided by the Independents should be detariffed not later than December 31, 1987, the date on which the interstate revenue requirement associated with that plant will be reduced to zero.

[7] In *United States v. AT&T*, the Modification of Final Judgment required that the divested BOCs transfer all their embedded CPE to AT&T not later than February 24, 1984. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S.Ct. 1240 (1983). Divestiture actually took place January 1, 1984, and wireline embedded CPE transferred by the BOCs to AT&T was detariffed on that date.

8. In affirming our view that continued state sales programs combined with a sale option as part of a transfer plan is the preferred approach, we indicated several advantages. First, it increases the choice for consumers. Second, it meets the requirements of *Democratic Central Committee.* Third, it advances our deregulatory goals of promoting a more competitive marketplace. We did, however, indicate that plans developed for Independents would need to be flexible. Thus, the preferred approach described in the *Notice* may not be the preferred approach in some cases. *Notice,* 94 FCC 2d at 86.

9. We tentatively concluded that investors must receive their net investment when CPE is removed from regulated service. Any gains or losses from the sale or transfer would accrue to the ratepayer, since the risk of loss has been borne by the ratepayer. We also tentatively concluded that for AT&T, in valuing the embedded CPE base, net book value would be used as a substitute for economic value. It was our further tentative view that if embedded CPE is offered for sale to in-place customers at net book plus reasonable transactions costs, this would meet the requirement of *Democratic Central Committee.*

10. Two proposals were presented in the *Notice* for detariffing of Independents' embedded CPE. One option would provide states with the flexibility to deregulate CPE on a schedule which responds to the particular circumstances of the Independents within their jurisdiction, as long as CPE was deregulated by December 31, 1987. It was tentatively concluded that this was the preferable option. The second, and less preferred option, would be for the Commission to establish a detailed plan for detariffing. It was our view that such an action would not be necessary, since states have the means to establish plans consistent with the *Second Computer Inquiry* objectives. We also proposed, however, that if states do not have plans in effect by July 1, 1985, to ensure detariffing by December 31, 1987, "this Commission would exercise its preemptive powers and issue guidelines under which all embedded CPE not covered by a state detariffing plan is deregulated." *Id.* at 110.

11. With respect to accounting issues, we indicated that we were establishing procedures for Independent companies similar to those proposed for record carriers in a separate proceeding. *Id.* at 106. A separate subsidiary for unregulated activities was not required by *Second Computer Inquiry* for Independent telephone carriers. If a company does not have a separate subsidiary, however, it must use separate books of account for its unregulated activities.

12. We concluded in the *Notice* with a statement that with respect to Independents our main concerns were that detariffing be completed by December 31, 1987, and that "the independents, working with state commissions, have sufficient latitude to establish detariffing plans which

enable them to recover their investment in embedded CPE with minimum consumer dislocation." *Id.* at 113.

D. First Report and Order

13. In the *Order*, we provided criteria and procedures for the removal from tariff of embedded customer premises equipment owned by AT&T. In that proceeding we indicated that we had to detariff embedded CPE owned by AT&T quickly because of divestiture, but since that did not apply to Independents, decisions on detariffing of Independent-owned CPE would be taken in a future rulemaking. *Order*, 95 FCC 2d at 1377. The *Order* discussed detariffing requirements for valuation, a sale and lease program for residence, single-line and multi-line CPE, billing and support, maintenance, deferred tax reserves and unamortized tax credits, land and building valuation and transfer, accounting rules, and intrasystem wiring. We concluded that a sale plan for embedded CPE together with transfer to unregulated service is the best means to achieve a competitive CPE marketplace. Further, we concluded that this plan meets the requirements of *Democratic Central Committee* since it balances the interests of ratepayers and investors. The *Order* indicated that intrasystem wiring owned by Independent companies will not be detariffed and removed from regulated service.

E. Second Report and Order

14. In the *Second Order*, which deals with embedded CPE used in mobile telephone service, we gave states the flexibility to fashion detariffing mechanisms for Independent companies within very general parameters set by the Commission, except that we would require detariffing to occur as of January 1, 1985. After that date, Independent companies will not be subject to any price predictability or sale requirements with regard to their embedded mobile CPE. In that proceeding, we allowed states the flexibility to establish valuation standards for removal of the CPE from regulated service, as long as they are consistent with the requirements of *Democratic Central Committee.*

III. Procedures for Detariffing

A. Regulatory Role of the States

1. Comments

15. Most of the respondents to this proceeding provide comments on state detariffing of embedded CPE owned by Independents.[8] The *Notice*

[8] The following parties filed comments regarding detariffing CPE owned by Independents: Municipality of Anchorage d/b/a Anchorage Telephone Utility (ATU), Arthur Andersen & Co. (Andersen), California Public Utilities Commission (California), Central Telephone Company (Centel); Cincinnati Bell Telephone Company (CBT), Colorado Public Utilities Commission (Colorado), Continental Telcom Inc. (Contel), Federal Executive Agencies

indicated that our preferred option for detariffing of embedded CPE owned by Independents is an approach which enables state responsibility and flexibility in establishing state plans. Many of the Independents and states support this approach.[9] NARUC, for example:

> [A]pplauds the FCC's acknowledgement in its NPR of the traditional role played by state utility commissions in the regulation of customer premises equipment ... and its tentative determination to allow the states the flexibility to tailor detariffing plans relative to the independent telephone companies so as to minimize any potential negative effects to customers.

NARUC Reply Comments at 1. North Dakota, although supporting the general concept, argues that states should not have to develop statewide plans by July 1, 1985, but rather should be able to certify to the Commission that Independents in their jurisdiction would detariff by December 31, 1987. North Dakota indicates that statewide plans may not be appropriate for each company. North Dakota Direct Comments at 8-9. California, agreeing with USITA, argues that "state commissions must be permitted sufficient latitude and flexibility to deal with the unique circumstances of the independent carriers. To promulgate inflexible nationwide regulations without considering local circumstances would

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(FEA), GTE Telephone Companies (GTE), Idaho Public Utilities Commission (Idaho), Illinois Commerce Commission (Illinois), Independent Data Communications Manufacturers Association Inc. (IDCMA), Kansas Corporation Commission (Kansas), Kentucky Public Service Commission (Kentucky), State of Maine and Maine Public Utilities Commission (Maine), State of Michigan Public Service Commission (Michigan), New Jersey Department of the Public Advocate (New Jersey), New York State Department of Public Service (New York), North American Telephone Association (NATA) (since renamed the North American Telecommunications Association); North Dakota Public Service Commission (North Dakota), Public Utility Commission of Oregon (Oregon), Rochester Telephone Company (Rochester), Rural Telephone Coalition (RTC), Southern New England Telephone Company (SNET), Tennessee Public Service Commission (Tennessee), United States Independent Telephone Association (USITA) (since renamed the United States Telephone Association), United Telephone System, Inc. (UTS), Virginia State Corporation Commission (Virginia), Washington Utilities and Transportation Commission (Washington), and Public Service Commission of Wisconsin (Wisconsin). Reply comments filed regarding detariffing Independents' CPE were received from: ATU, California, Public Service Commission of the District of Columbia (District of Columbia), Contel, FEA, GTE, IDCMA, Michigan, Minnesota Public Utility Commission (Minnesota), National Association of Regulatory Utility Commissions (NARUC), NATA, Rochester, and SNET. Supplementary comments were filed by GTE in a letter dated August 6, 1984 and SNET. Summaries of these comments as well as those on detariffing AT&T's embedded CPE are included in the docket in this proceeding.

[9] *See* California Direct Comments at 33; SNET Direct Comments at 3-4; USITA Direct Comments at 3; UTS Direct Comments at 18; Centel Direct Comments at 3; Contel Direct Comments at 1-2; GTE Direct Comments at 8; Kansas Direct Comments at 4; Michigan Direct Comments at 7; Virginia Direct Comments at 9; Wisconsin Direct Comments at 8; RTC Direct Comments at 2; ATU Reply Comments a 2-3; California Reply Comments at 9-10; Michigan Reply Comments at 4.

create customer dislocations and put an unnecessary burden on the state commissions." California Reply Comments at 9-10. Idaho also argues for flexibility:

> We urge the Commission that any sales plan that it might adopt keep intact the sales plans already implemented by state commissions. There may be various concerns of a local nature to be addressed by each individual state commission and the IPUC believes that each should be free to consider its unique circumstances in designing a sales program for its telephone customers.

Idaho Direct Comments at 2. Wisconsin and Washington both indicate they currently lack the legal authority to implement some of the options identified in the *Notice* for detariffing.[10]

16. Several Independent telephone companies support state detariffing with substantial flexibility for the state.[11] USITA, their trade association, commends the Commission "for its recognition in the *Notice*, that the Independents must be treated differently than AT&T and its subsidiaries." USITA Direct Comments at 2. USITA argues that, unlike AT&T, the individual Independent telephone companies do not provide nationwide service. USITA further indicates that since most of the Independents serve only one state and are subject to regulatory practices of only one state, "it would be inappropriate for the FCC to impose a single nationwide detariffing plan for the 1459 different Independent telephone companies." *Id.* at 3. Rather, USITA indicates, the Commission must allow flexibility. "This flexibility must extend to the timing and options for sale, transfer or retirement of embedded CPE, to the valuation of the Independent's embedded CPE, and to the accounting procedures used by individual companies." *Id.*

17. Some Independents, however, have concerns about the proposal. RTC suggests that we should make it clear that it is not necessary that states establish statewide rules which will apply uniformly to all Independent telephone companies located within the state, where carriers voluntarily adopt plans which conform with state and federal requirements. RTC Direct Comments at 2-3; *See* ATU Reply Comments at 2. A major concern expressed by Independents is that states should be required to ensure full capital recovery for embedded CPE.[12] USITA and GTE argue that states should not have the authority to impose detariffing plans. Rather, they argue that Independents should participate voluntarily in the process and have a veto over state plan requirements as applied to their companies.[13] GTE proposes a "deregulatory framework" for the Commission to adopt which would provide guidelines within which states

[10] Wisconsin Direct Comments at 3; Washington Direct Comments at 1.

[11] *See* para. 15 n.9, *supra*.

[12] USITA Direct Comments at 6; GTE Direct Comments at 4.

[13] *See* GTE Direct Comments at 15; GTE Reply Comments at 8; USITA Direct Comments at 4-5.

and independents could work together on a voluntary basis. GTE Reply Comments at 4. CBT proposes that the Commission retain jurisdiction rather than allow the states to detariff. CBT states that since it operates in a multi-state jurisdiction, it is possible that it would be required to operate under several different rules which would produce confusion and increased costs. CBT also argues, however, that it should be allowed to detariff in a manner that responds to its specific environment. CBT Direct Comments at 2.

18. Rochester suggests that the Commission should permit an option for all Independent telephone companies serving highly competitive urban markets to detariff embedded CPE according to a policy and schedule similar to that established for AT&T, although Rochester would request some modifications to the AT&T plan. Rochester argues that unless it can detariff in a similar time frame as AT&T, it would be placed at a competitive disadvantage. Rochester also indicates that the Commission cannot give the state commissions the responsibility for achieving national objectives. Rochester foresees administrative appeals regarding inconsistencies between state and national policy. Rochester Direct Comments at 3-10.

19. USITA, on the other hand, argues that a national set of guidelines would be too restrictive and would not allow for the flexibility needed because of the variations in state embedded CPE tariffing procedures. USITA Direct Comments at 3. USITA indicates that it "would oppose preemption of the states in these areas, since uniform valuation and accounting would interfere with established ratemaking principles and historical practices in the various states." *Id.*

20. FEA opposes state establishment of sales prices for embedded CPE. FEA argues that "[i]n a period of numerous changes and uncertainty, their proposals merely increase the magnitude of the problem faced by a nationwide user of telecommunications services. It also introduces additional delays and thus prolongs the uncertainty of what alternatives are available." FEA Reply Comments at 7. Thus, FEA urges the Commission to set a uniform nationwide sales price.

2. Discussion

21. Embedded CPE owned by AT&T was detariffed on January 1, 1984, coincident with divestiture of the Bell System. The detariffing process was centralized rather than delegated to the states because of the extensive holdings of embedded CPE owned by AT&T, the potential national impact on the marketplace and customers, and the short time frame for detariffing brought about by divestiture. We had recognized in *Second Computer Inquiry,* that this Commission must be directly involved in the detariffing of AT&T's embedded base. We noted that

"[w]e could not authorize such a large transfer to the separate subsidiary without first examining the timing, extent and terms of the transfer and its effect on competition in the equipment marketplace." *Further Reconsideration Order*, 88 FCC 2d at 524. If the Commission had not allowed AT&T to detariff embedded CPE on January 1, 1984, AT&T would have had to establish separate regulated entities to handle the embedded CPE. These separate regulated entities would have been required in each state and states would have had to review and act on the tariffs, thereby placing potentially enormous additional costs on consumers. *Order*, 95 FCC 2d at 1305. Furthermore, we concluded "if each state were to have a role in establishing sale prices for equipment transferred to ATTIS, their attempts to do so would introduce further uncertainty and delay." *Id.* at 1309.

22. Many of the conditions facing the Commission in developing rules and procedures for detariffing embedded CPE owned by AT&T are not applicable in developing a detariffing framework for Independents: (1) Independents are not required to establish a separate subsidiary for detariffed embedded CPE; (2) the time pressure produced by divestiture does not exist; and (3) although collectively Independents have a national impact, they serve smaller markets, many in only one state, and thus national guidelines may not be necessary or beneficial. There is substantial support expressed by the commenters for Option 1, state detariffing, and very little support expressed for development of specific national guidelines established by the Commission, Option 2. *Notice*, 94 FCC 2d at 109-10. State detariffing enables state commissions to take into account the diverse circumstances of carriers within their jurisdiction, including size, structure, and operations. States can deal with the effect of detariffing on diverse Independent telephone companies and take action to provide a workable transition process. Thus, we reaffirm our tentative conclusion that "states should have the flexibility to deregulate embedded CPE of the independents within the time frame we are proposing." *Notice*, 94 FCC 2d at 109. We also conclude that in the specific circumstance of detariffing embedded CPE tariffed at the state level, it is in the public interest that states be given a substantial role in developing procedures for detariffing, acknowledging states' traditional role in the regulation of CPE.[14] This conclusion is consistent with a recent decision of the Commission in the *Second Order* which provided procedures for

[14] Our finding in this Order, that states may implement federal policy with respect to detariffing of embedded CPE owned by Independents and tariffed at the state level, does not prejudice or conflict with our decision in other areas where implementation at the national level is required. *See Order*, 95 FCC 2d at 1305; *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies*, Memorandum Opinion and Order, 92 FCC 2d 864, 876 (1982), *aff'd sub nom. Virginia v. FCC*, Civ. No. 83-1136 (June 18, 1984), *petitions for rehearing denied* (October 3, 1984).

detariffing embedded mobile CPE. States were given the role of establishing valuation requirements for the removal of embedded mobile CPE assets from regulated service. In the *Second Order*, at para. 33, we indicated that:

> [T]he transition to a fully deregulated mobile CPE market can be made more workable through cooperation between the Commission and the states, and it is a primary goal of this Order to foster that cooperation by enabling the states to assume primary responsibility for the establishment of asset valuation requirements and rules.

23. Some of the commenters argue that the states should not have to develop state plans but should be given the flexibility to approve CPE detariffing plans developed by Independent companies. It is our conclusion that this approach would be consistent with the objective of state flexibility as long as the plans developed by the Independents and approved by the states meet the requirements for state CPE detariffing set forth in this Order.

24. Regarding Independents operating in more than one jurisdiction, it is clear that these Independents already deal with a variety of tariff processes. Contel indicates that it already has experience working with several states and that it is "prepared to work with individual state commissions to develop acceptable programs." Contel Direct Comments at 2. The existence of companies which operate in more than one jurisdiction does not present sufficient reason to require a national plan to detariff embedded CPE. These companies, like Contel, have traditionally been subject to tariff regulation in many different states, and deregulation of embedded CPE falls within typical state tariff procedures.

25. It is suggested by some Independents that states should not be given the authority to require state plans, but rather that plans should be developed voluntarily by Independents, in concert with the state. While we hope and expect these undertakings to be cooperative, we will not limit the states' flexibility to accept a carrier's plan, to prescribe a plan, or to negotiate a plan with the carrier. In the final analysis, the state, not the carrier, must balance the interests of carriers and ratepayers. As argued by Michigan:

> USITA fails to recognize that telephone utilities are monopolies within their market area. It is not their job to strike a balance between protection of the investor and the ratepayer. Rather, state public utility commissions were formed for this purpose and it is their responsibility to insure that the rights of both the investor and the ratepayer are protected. If the concurrence of carriers is required, it could slow the process of determining a scheme by the State Commission or even prevent the State entirely from having a scheme in place by June of 1985.

Michigan Reply Comments at 3. The level of coordination between the states and Independents within their jurisdiction in developing, approving, and implementing plans may vary due to diverse circumstances within

each state. The flexibility afforded by state detariffing will provide a mechanism for Independents to argue their special circumstances before their state commission, which should be aware of special needs and requirements of the Independents and state laws.

26. Rochester proposes that larger Independents should be allowed to detariff through a modified AT&T plan filed with this Commission rather than through the state, at the discretion of the Independent. This would create uncertainty about who has the authority for approval of detariffing, since large Independents could request approval from either the state or this Commission, or from both authorities. It would also enable large Independents to circumvent the detariffing requirements set by the states. One of the objectives of allowing states to perform detariffing is to accommodate the special circumstances of Independents within their jurisdiction. The structure we are adopting in this Order does not preclude the rapid detariffing favored by Rochester, since states which have Independents who request immediate detariffing may choose to detariff using a modified AT&T plan.

27. With regard to FEA's opposition to state-by-state sale of embedded CPE, we find that in order to provide states with the flexibility to deal with circumstances of customers and Independents in their jurisdiction some large users may be inconvenienced in having to deal with several state commissions. However, that is not sufficient reason to preclude this opportunity for state flexibility. In the case of embedded CPE provided by Independents for national security and emergency preparedness (NSEP) functions, we have proposed several alternatives in the *Second Further Notice*. Our action in this Order does not affect embedded CPE used for NSEP communications systems.

B. State Plan Requirements

28. In the *Order*, we set out detailed requirements for detariffing embedded CPE owned by AT&T, including requirements for valuation, sale and lease programs for residence, single-line, and multi-line CPE, billing and support maintenance, deferred tax reserves and unamortized tax credits, land and building valuation and transfer, accounting rules, and intrasystem wiring. Although the AT&T plan may provide a model for states in any one or all of these areas, we have concluded that states should have flexibility on how most of these issues are handled for Independents within their jurisdiction.[15]

29. In the *Notice of Inquiry*, we proposed four options for deregulating embedded CPE[16] which might be used separately or in tandem. The

[15] The *Order* did indicate that intrasystem wiring owned by Independents was to remain under regulated service. *Order*, 95 FCC 2d at 1371.

[16] *See* para. 6, *supra*.

list presented was not meant to be exhaustive. After careful review we concluded that a sale option to in-place customers coupled with a transfer plan to unregulated service of unsold embedded CPE had several advantages, since it: (1) increases the options for consumers; (2) meets the requirement of *Democratic Central Committee* for balancing the interests of ratepayers and investors; (3) meets the deregulatory goals of *Second Computer Inquiry* by promoting competition in the CPE marketplace and removing rate regulation; and (4) provides for expeditious transfer of embedded CPE out of the rate base, which limits the potential risks brought about by competitors to ratepayers of having to recoup carriers' investment in CPE removed from service before it is fully depreciated. *Notice*, 94 FCC 2d at 86. Although this option was selected for AT&T, it is our intention to provide flexibility for states to select an option which meets the requirements of Independents and consumers within their jurisdiction.

30. States must comply with the following requirements, however, in developing and implementing detariffing of embedded CPE:

(1) Implementation timetable.

(2) Valuation guidelines.

(3) State certification.

(4) Accounting and tax requirements.

(5) Other detariffing rules.

1. Implementation Timetable

31. (a) *Comments.* Most of the commenters agree that December 31, 1987, is an acceptable date before which all embedded CPE owned by Independent telephone companies must be detariffed.[17] Rochester argues that detariffing should be done as soon as possible because of anticipated competition by unregulated sources, and the possibility that Rochester would be at a competitive disadvantage if its embedded CPE remained under regulation. Rochester Direct Comments at 3. Several telephone companies stress the need to ensure full capital recovery during the transition period.[18] If the transition period is too short, some commenters indicate the telephone companies may experience "extreme depreciation disparity." ATU Direct Comments at 10. Several telephone companies argue that they should be given the flexibility to detariff at a time which responds to competitive situations and at the most appropriate time for

[17] *See* Kansas Direct Comments at 4; RTC Direct Comments at 2; SNET Direct Comments at 3; USITA Direct Comments at 4; Michigan Direct Comments at 7; RTC Direct Comments at 2. California Direct Comments at 33.

[18] *See* Central Direct Comments at 3; ATU Direct Comments at 10-11; Contel Direct Comments at 3; GTE Direct Comments at 15; SNET Reply Comments at 3.

their operating conditions.[19] There is general support for the July 1985 progress report date. Many Independents support the proposal in the *Notice* that if states do not have plans developed or steps taken towards detariffing by July 1985 the Commission should take preemptive action and establish federal guidelines.[20]

32. (b) *Discussion.* On February 24, 1982, we adopted a plan recommended by a Joint Board convened in CC Docket 80-286 for phasing CPE out of the jurisdictional separations process. The phase-out will occur over a five-year period commencing with the effective date of the *Second Computer Inquiry* decision, January 1, 1983. *See* para. 2 n.5, *supra.*

33. Accordingly, we make final our proposal to complete detariffing by December 31, 1987, when interstate revenue requirements for embedded CPE are reduced to zero. In those states which have had sale plans for a long period of time, so that customers have had an opportunity to purchase their equipment and where Independents are facing significant competition, it may be advantageous to detariff as soon as possible. States where there have not been sales programs or where those programs have not led to significant sales may find it more advantageous to wait until December 31, 1987, to detariff.[21] The December 31, 1987, deadline balances several objectives: (1) detariff as quickly as possible to promote a competitive CPE marketplace through the elimination of tariff regulation; (2) provide states with sufficient time to establish plans for detariffing which meet the specific circumstances of the Independents in their jurisdictions; (3) provide customers with an opportunity to analyze the options available to them with respect to CPE; and (4) provide a period for Independents to obtain capital recovery on embedded CPE.

34. In order to ensure that full capital recovery is possible, where a state requests an extension for a specific Independent telephone company, the Commission will consider extending the deadline for detariffing on a case-by-case basis until not later than December 31, 1990. This responds to the comments by some of the Independents regarding their concern that there should be sufficient time to attain full capital recovery.

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[19] CBT Direct Comments at 2; ATU Direct Comments at 10; Rochester Direct Comments at 10.

[20] *See* GTE Direct Comments at 21; GTE Reply Comments at 11; UTS Direct Comments at 18; USITA Direct Comments at 6. *See also* NARUC Reply Comments at 3.

[21] GTE Supplementary Comments at 1. In the *Second Order* embedded mobile equipment was detariffed on January 1, 1985, because mobile equipment has been for sale to customers for an extended period of time, because there is very little embedded mobile equipment in place, and because of the high level of competition in the mobile equipment marketplace. In the *Second Order* we stated that "[o]ur conclusion here is without prejudice to any action we might take with respect to embedded wireline CPE owned by the Independents." *Second Order* at para. 32.

2. Asset Valuation and Capital Recovery

35. (a) *Comments.* Commenters vary considerably in their preference for a valuation mechanism. ATU supports the use of net book value, the valuation mechanism utilized in AT&T detariffing,[22] while others argue that it would depress sales and leave investors with stranded investment.[23] Others support the use of fair market value.[24] Several commenters, argue for flexibility.[25] For instance, USITA indicates that "individual Independent companies, in cooperation with their state commissions, should be permitted to adopt a valuation method based upon 1) the detariffing method chosen by the carrier, 2) the state commissions' historical rulemaking practices, and 3) the conditions that exist for detariffed CPE within the particular market." USITA Direct Comments at 7.

36. A major concern expressed by Independents, and linked with determining the valuation mechanism, is the need for full capital recovery.[26] Contel indicates that capital recovery is the overriding issue in detariffing. "The program must allow telephone carriers to recover all capital prudently invested in CPE under regulation and assure them an opportunity to earn a reasonable rate of return on their investment in regulated telephone plant and equipment during the transition period required to complete detariffing."[27] Contel argues that Independents would be unable to absorb the losses without a diminution of capital if there is a failure to provide for full capital recovery. Contel Reply Comments at 5. USITA argues that *Democratic Central Committee* requires that investors receive full capital recovery. USITA Direct Comments at 6.

37. (b) *Discussion.* In order to sell or transfer embedded CPE, it is necessary to develop procedures for valuation. In the *Order* economic value was determined to be the proper valuation standard. *Order,* 95 FCC 2d at 1306. In the *Notice of Inquiry* economic value was defined as the

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[22] ATU Direct Comments at 2.

[23] GTE Direct Comments at 22; SNET Supplemental Comments at 3; UTS Direct Comments at 7; SNET Reply Comments at 4; Rochester Direct Comments at 6-7. RTC Direct Comments at 3.

[24] SNET Direct Comments at 7-8; UTS Direct Comments at 7; GTE Direct Comments at 22; UTS Direct Comments at 8.

[25] Centel Direct Comments at 5; CBT Direct Comments at 4; UTS Direct Comments at 7-8; USITA Direct Comments at 7.

[26] GTE Reply Comments at 1. *See also* Contel Direct Comments at 4; USITA Direct Comments at 6; ATU Reply Comments at 3; Centel Direct Comments at 3; SNET Reply Comments at 3. UTS Direct Comments at 1.

[27] Contel Reply Comments at 1. *See also* UTS Direct Comments at 1, 5-6; GTE Direct Comments at 4; Centel Direct Comments at 3; USITA Direct Comments at 2, 6; GTE Reply Comments at 1.

price a carrier would be willing to pay for its CPE if, instead of owning it, the carrier had the opportunity to purchase it. *Notice of Inquiry*, 89 FCC 2d at 697. Four alternative methods for measuring or developing a surrogate for economic value were presented:

1) Imitating the process a firm would pursue in its capital budgeting process to estimate the economic value.

2) Using net book value as a proxy for economic value.

3) Relying on asset appraisal by independent appraisers.

4) Conducting auctions.

Id. at 698-99.

38. For AT&T, we found that net book value provided the best proxy for economic value since it "has the advantage of extreme simplicity, and it may be the most prudent approach in some cases given the practical difficulties of implementing other alternatives." *Id.* at 698, *cited in Order*, 95 FCC 2d at 1310. We further concluded, regarding AT&T detariffing, that a sale plan for embedded CPE coupled with a plan for transferring the remaining CPE to unregulated service was consistent with the equitable principles of *Democratic Central Committee*, since it properly accommodates the interests of both ratepayers and investors.

39. Whatever valuation method is selected for detariffing Independents' embedded CPE, it must comply with the principles of *Democratic Central Committee*, *i.e.*, "gains or losses on transfer or sale of assets must go to the entity, carriers, investors or ratepayers, which bore the risk of loss of capital value over the regulated life of the asset." *Democratic Central Committee*, 485 F.2d at 806.[28] In the *Second Order*,

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[28] In the *Democratic Central Committee* decision the court concluded that the right to gains follows the risk of loss. If ratepayers have borne the risk of capital loss on assets in regulated service, then ratepayers are entitled to any gains in the value of the assets upon their removal from regulated service. *Democratic Central Committee*, 485 F.2d at 807, *cited in Order*, 95 FCC 2d at 1309. The court also concluded that economic benefits must follow economic burdens. An economic burden is borne by ratepayers, reasoned the court, as a result of the fact that "utility investors are entitled to recoup from customers the full amount of their investment in depreciable assets devoted to public service." *Id.* at 806.

This equity and balancing rule is further enunciated in *Democratic Central Committee*:

> The investor's interest lies in the integrity of his investment and a fair opportunity for a reasonable return thereon. The consumer's interest lies in governmental protection against unreasonable charges for the monopolistic service to which he subscribes. In terms of property value appreciations, the balance is best struck at the point at which the interests of both groups receive maximum accommodation.

Democratic Central Committee, 485 F.2d at 806, *cited in Order*, 95 FCC 2d at 1316. We have concluded that:

> The rule announced in that case [*Democratic Central Committee*] is that neither

at para. 38, we concluded with respect to *Democratic Central Committee* that:

> [T]he case does not require the use of any particular valuation method but instead stands for the proposition that those who bore the risk of capital loss during the period in which assets are in regulated service are entitled to gains (and must bear the losses) upon the removal of those assets from regulated service.

40. Because of the variety of state laws, market conditions, and operating procedures of the Independent companies across the nation, we conclude that we should allow states to set a measurement for valuation for embedded CPE owned by Independents. For us to determine the appropriate measure for economic value for each state, given the variations in regulatory history and market conditions, would be difficult and might not provide an equitable balance for investors and ratepayers. Thus, we conclude that state commissions should establish the valuation standard for embedded CPE owned by Independents, consistent with the principles of *Democratic Central Committee*. In setting valuation, states should, to the extent appropriate to the circumstances in their state, use economic value as a valuation standard since it offers a mechanism for balancing the interests of *Democratic Central Committee*. In developing valuation standards for sale or transfer of embedded CPE, state commissions will have the flexibility to use adjusted net book, appraisals, or any other valuation standard. As we indicated in the *Second Order*, "our goal is to maximize the flexibility of the states in dealing with the valuation issues." *Id.* at para. 41. The valuation standard selected by each state must meet the requirements of *Democratic Central Committee* and follow this Commission's prescribed accounting which was reiterated in the *Order*.

3. State Certification

41. We originally proposed to require states to provide certifications[29] to the Commission by July 1, 1985. We will extend the date for three months to September 1, 1985 to allow sufficient time for all states to act. The certification must provide information on: (1) detariffing procedures developed by the state; (2) how the state will ensure that embedded CPE

> the investors nor the ratepayers have a vested right to the gains from the sale of appreciated utility property. Rather, our task in this matter is properly to balance the investor and ratepayer interests so as to apportion gains and losses in the most equitable manner.

American Telephone and Telegraph Co. Charges for Interstate Telephone Service, Docket No. 19129, Phase II, Final Decision, 64 FCC 2d 1, 66 (1977) *cited in Order*, 95 FCC 2d at 1314.

[29] States which have already detariffed embedded CPE owned by Independents in their jurisdiction prior to the effective date of this Order, must file state certifications which indicate compliance with the requirements of this Order.

owned by Independents will be deregulated by December 31, 1987; (3) how the valuation mechanisms established will meet the requirements of *Democratic Central Committee*; and (4) accounting and tax procedures established as required by this Order. No specific format has been established for the certification; however, state plan certifications must discuss the timetable for detariffing. They must also discuss the method of valuation, lease, sale, and transfer of the embedded CPE.

42. Independents operating in those states which do not submit certifications by September 1, 1985, must follow the requirements of the AT&T Plan, as specified in the *Order*, for detariffing embedded CPE, effective January 1, 1986.

4. Accounting and Tax Requirements

43. Independent telephone carriers were not required to create a separate subsidiary to provide CPE and enhanced services by our *Second Computer Inquiry* decision. In order to provide CPE, however, they must maintain separate books of account. In the *Notice*, we indicated that even though we had not yet established specific accounting requirements, an Independent company could provide CPE and enhanced services, but these activities must be accounted for in non-ratemaking accounts. For CPE sold under regulation, existing accounting procedures reiterated for AT&T in the *Order* must be used by Independent telephone companies. *Order*, 95 FCC 2d at 1368.[30]

44. For new CPE or CPE transferred out of regulation we are considering, in a separate proceeding in this docket, the establishment of accounting procedures for Independents similar to those established for record carriers in CC Docket No. 82-678.[31] We requested comments with respect to the application of these accounting procedures to Independent companies in the *Notice*. These accounting procedures will be established in a subsequent action in this docket.

45. In the *Order* transferring embedded CPE to AT&T Information Systems we required the transfer of both the deferred tax reserves and unamortized investment tax credits with the associated embedded CPE. *Id.* at 1359-65 & Appendix A. We concluded that "such a transfer would be consistent with the intent of Congress in providing for the tax benefits of accelerated depreciation and investment credits for regulated utilities and with underlying accounting standards." *Id.* at 1360. Several of the

[30] This does not preclude states from requiring supplemental records to satisfy state ratemaking purposes.

[31] *Amendment of Part 34 and Part 35*, CC Docket No. 82-678, Report and Order, FCC 83-398, 48 Fed. Reg. 45708 (released Sept. 21, 1983). *See also* note 30.

commenters[32] support similar action with respect to the transfer of embedded CPE owned by Independents. Because of the national perspective of these tax policies,[33] we conclude that the same procedures are required for unamortized investment tax credits and deferred tax reserves associated with embedded CPE owned by Independents. We recognize, in making this decision, that adjustments may be needed for those Independent telephone companies which have used "flow-through" accounting. States may provide an adjustment in the tax treatment for these companies in state ratemaking proceedings or other means deemed appropriate by the states. For example, the state may provide an imputed normalized value, to be borne by ratepayers, for the transferred embedded CPE, to account for deferred taxes that have not been accumulated to pay future tax liabilities.[34]

5. Other Detariffing Rules

46. The *Order*, in deregulating embedded CPE owned by AT&T, discussed requirements for valuation, a sale and lease program for residence, single-line, and multi-line CPE, billing and support, maintenance, deferred tax reserves and unamortized tax credits, land and building valuation, and transfer.

47. Comments were received from Independents and states on many of these issues. In order to maintain flexibility, we are not deciding all these issues, but rather, providing the states with the opportunity to determine the most appropriate actions consistent with the laws of each state and the circumstances of the Independents within their jurisdiction.[35] However, we reiterate that these decisions must be made within

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[32] SNET Reply Comments at 6; Rochester Direct Comments at 10-12; Andersen Direct Comments at 1-4; GTE Direct Comments at 35-38; USITA Direct Comments at 11-12; Central Direct Comments at 7-9.

[33] It has been noted that "[m]any ... tax expenditures were expressly adopted to induce action which the Congress considered in the national interest. For example, the investment credit was intended to encourage the purchase of machinery and equipment ...." Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705, 711 (1970). Surrey defines tax expenditures as "those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives." *Id.* at 706.

[34] See Rochester Direct Comments at 11; GTE Reply Comments at 17-18. For a discussion of normalized and "flow-through" tax issues *see Order*, 95 FCC 2d Appendix A at 1395-1401.

[35] With regard to CPE needed by the disabled, states may decide whether or not to detariff the specialized terminal equipment needed by persons whose hearing, speech, vision or mobility is impaired, consistent with: Telecommunications for the Disabled Act of 1982, Pub. L. No. 97-410, 47 U.S.C. §610 (1982); *Access to Telecommunications Equipment by the Hearing Impaired and other Disabled Persons*, CC Docket No. 83-427, Memoran-

the timetable required by this Order and consistent with the requirements of *Democratic Central Committee* and our prescribed accounting.

C. Commission Monitoring of State Deregulation of Embedded CPE

1. Comments

48. As indicated earlier, there has been significant support for state detariffing of embedded CPE owned by Independents. Several of the commenters, however, indicate an interest in having the Commission maintain a monitoring role. The major concerns for Commission monitoring are to ensure state compliance with a timetable which would enable detariffing by December 31, 1987, and to enforce the requirements of *Democratic Central Committee* for full capital recovery. *See, e.g.*, USITA Direct Comments at 5, 13. GTE argues that the Commission should establish a monitoring plan to ensure state compliance because some states may not be cooperative and recommends that a procedure be developed for Independents to meet with the Commission to discuss progress by the states. GTE Direct Comments at 5, 17. Rochester argues that the Commission should retain jurisdiction to preempt state plans that may be inconsistent with Commission policy, and provide a forum for appeals by Independents regarding state implementation. Rochester Direct Comments at 7. Contel argues that the Commission may need to evaluate from time to time state implementation of detariffing plans, but suggests that such procedures could be developed later. Contel Direct Comments at 4. UTS urges the Commission to review sales plans already developed by states as well as maintaining preemptive powers over future state plans. UTS Direct Comments at 18; *see* USITA Direct Comments at 13-14. CBT and Rochester argue that the Commission should reserve authority to make sure that national competitive CPE policies are achieved. CBT Direct Comments at 2; Rochester Direct Comments at 7. Illinois requests that should the Commission have to take preemptive action in the case of a state which has not taken action, the preemptive action be used to increase the state's power to detariff when needed. Illinois Direct Comments at 7.

2. Discussion

49. It is our conclusion that it is in the public interest that states be allowed the maximum flexibility in detariffing embedded CPE owned by Independent telephone companies. As we have concluded previously, "we are anxious for the state commissions to take an active part in establishing detariffing mechanisms which are tailored to the particular circum-

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dum Opinion and Order, 95 FCC 2d 1421 (released November 25, 1983), Report and Order, FCC No. 83-565, (released December 23, 1983).

stances of the various state jurisdictions." *Second Order*, at para. 30. As we have also concluded previously, "reasonable means are available to state regulators to effectuate the detariffing of CPE consistent with our *Second Computer Inquiry*." *Notice*, 94 FCC 2d at 110. In order to maximize state flexibility in tailoring detariffing plans, we will maintain a minimum level of monitoring, limited essentially to assuring that states develop state plans or take similar steps by September 1, 1985, for detariffing by December 31, 1987, and that the detariffing actions are consistent with *Democratic Central Committee* and follow accounting procedures developed by the Commission.

50. Our objective in monitoring state progress in detariffing is to ensure that states carry out our objectives of the *Second Computer Inquiry* decisions in a timely manner and in a manner which will balance the concerns of ratepayers and investors. It is also our objective, however, to give states considerable flexibility in developing detariffing plans. Thus, we have not set a comprehensive set of guidelines similar to those set for AT&T. Nor do we plan to diminish the role of the states by continuously monitoring their progress or questioning their actions. It will be the states' responsibility to implement the plans and evaluate progress. Problems identified during the detariffing process should be resolved between the state and the Independents. We do not foresee our involvement in this process. We do not, however, foreclose the possibility of federal preemptive action,[36] if states do not proceed to detariff within the required timeframe, or if states do not comply with the principles of *Democratic Central Committee*.

51. State certification, due September 1, 1985, will be deemed approved, if the Commission does not notify states otherwise within 90 days after receipt by the Commission. Subsequent to the September 1, 1985, deadline, if we determine that any of the states has failed to establish a statewide plan or take other action necessary to achieve detariffing by December 31, 1987, consistent with *Democratic Central Committee*, we intend to require Independents within those states to follow the AT&T plan for detariffing embedded CPE, effective January 1, 1986. We will also expect those states to monitor the detariffing of embedded CPE

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[36] In the *Order* we conclude that:

> [R]emoving the embedded CPE base from rate regulation in no way diminishes our responsibilities under the Act to provide for an efficient national telecommunications network. In fashioning a detariffing and transfer plan, and transitional procedures to prevent dislocations, we have been cognizant of the broad array of interests which must be balanced, and we are exercising our authority in this proceeding in an equitable manner which achieves the maximum accommodation of these interests.

Order, 95 FCC 2d at 1318.

owned by Independents within their jurisdiction according to the requirements of the AT&T plan and this Order.

52. We encourage states and Independents to work closely in developing detariffing plans. The detariffing framework presented in this Order provides an opportunity for state commissions to balance the needs of Independents and their customers.

IV. Regulatory Flexibility Certification

53. We invited interested parties in the *Notice* to comment upon our initial regulatory flexibility analysis. *Notice*, 94 FCC 2d at 113-14. Our analysis stated our legal authority for taking action in this proceeding, concluded that our proposed rules would not duplicate, overlap, or conflict with any existing federal rules, and stated the tentative view that this proceeding does not apply to small businesses, as that term is defined in the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612. *Id.* None of the parties filing comments regarding the *Notice* addressed any of these issues.

54. We hereby certify that the Regulatory Flexibility Act is not applicable to the action we are taking in this proceeding. This Order affects the offering of CPE by Independents. As we indicated in the *Notice*, although some of the Independents are small, we found in a prior proceeding that they are outside the narrow definition in that Act. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 338 (1982) *aff'd in part, National Association of Regulatory Utility Commissioners v. FCC*, No. 83-1225 (D.C. Cir. June 12, 1984) (Local exchange carriers are excluded from the definition of "small entity" because they are dominant monopolies in their fields of operation). We find no reason to alter the tentative view we expressed in the *Notice* that none of these companies is a small business for purposes of the Regulatory Flexibility Act. As we have recently noted in another proceeding, the Act "was apparently designed for the protection of small businesses that are directly subject to administrative rules rather than businesses that are indirectly affected by the results that any rules will produce." Although small businesses may be indirectly affected by the results of our actions in this Order no small businesses are directly subject to our action. By providing a flexible framework for detariffing the embedded CPE owned by Independent companies, this Order enables an easier transition which may provide more specific relief for the circumstances facing particular Independents. The Order provides the framework for the removal of tariffs and the enhancement of a more competitive environment.

V. Ordering Clauses

55. Accordingly, IT IS ORDERED That, pursuant to Sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47

U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, and 403, the policies, rules, and requirements set forth in this Report and Order ARE ADOPTED.

56. IT IS FURTHER ORDERED, That the supplemental comments filed by the Southern New England Telephone Company ARE ACCEPTED, as requested.

57. IT IS FURTHER ORDERED, That the Secretary of the Commission shall cause a copy of this Report and Order to be provided to each state regulatory commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Employment, Equal Employment Opportunity Rule, Compliance Ordered Petition to Deny

Petition to deny certain license renewal applications dismissed and/or denied. Where minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities and women during the license term, appropriate remedial sanctions will be ordered. —*Texas Broadcast Stations*

FCC 84-494

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Certain Broadcast Stations Serving Communities in the State of Texas

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1984; Released: October 29, 1984

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (i) a "Petition to Deny and to Intervene" filed July 1, 1983, by the National Black Media Coalition and others (hereafter "Petitioners") against the license renewal applications of twenty-four broadcast stations serving various communities in the State of Texas;[1] (ii) opposition pleadings from the licensees; (iii)

[1] The challenged license renewal applications include: in Austin, KLRU-TV (File No. BRET-830401KW), licensed to Southwest Texas Public Broadcasting Council; in Belton, KTON (File No. BR-830401WS) and KTON-FM (File No. BRH-840405BG), licensed to Tetco Inc.; in El Paso, KTSM (File No. BR-830526VP) and KTSM-FM (File No. BRH-830329XK), licensed to Tri-State Broadcasting Co., Inc.; in Lubbock, KSEL (File No. BR-830331B4) and KSEL-FM (File No. BRH-830331US), licensed to KSEL, Inc., KRLB (File No. BR-830331UR) and KRLB-FM (File No. BRH-830331YK), licensed to KRLB, Inc., and KFYO (File No. BR-830331UA), licensed to South Plains Broadcasting Co., Inc.; in Abilene, KEAN (File No. BR-830314UD) and KEAN-FM (File No. BRH-830314WR), licensed to Taylor Broadcasting, Inc.; in Longview, KYKX(FM) (File No. BRH-830314VW), licensed

an opposition from the American Legal Foundation (ALF); (iv) an untimely filed reply by the petitioners; and (v) various related pleadings.[2]

2. *Procedural Matters.* The petitioners present arguments with respect to their standing. Review of the affidavits[3] submitted by the petitioners reveals that none of them is a listener or a resident of the service area of Stations KTON/KTON-FM, KTSM/KTSM-FM, KEAN/KEAN-FM, KYKX-FM, KYKS-FM, KIPR/KIPR-FM, KBUC/KBUC-FM, and KFDX-TV. Accordingly, the renewal challenge against these stations will be treated as an informal objection.[4] With respect to the remaining stations, we have received affidavits from local residents. Although these affidavits were not timely filed, the explanation for their late submission reveals that the petitioners did not intend to abuse the processes of the Commission. Therefore, we will accept the late-filed affidavits *nunc pro tunc*, (*Malrite of New York*, 71 F.C.C. 2d 241, 242 (1979)), and consider the NBMC/Austin Black Media Coalition/Lubbock NAACP pleading as a petition to deny the applications of KLRU-TV, KSEL/KSEL-FM, KLRB/KLRB-FM, and KFYO.

3. *Preliminary Matters.* The petitioners charge that the employment profiles and EEO programs of each of the challenged stations show that the licensees have not complied with the Commission's EEO rule (Section

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to Stereo-FM 105, Inc.; in Lufkin, KYKS(FM) (File No. BRH-830314VX), licensed to Lufkin Broadcasting, Inc.; in Diboll, KIPR (File No. BR-830401VP) and KIPR-FM (File No. BRH-830401AE), licensed to KIPR Associates; in San Antonio, KBUC (File No. BR-830401UD) and KBUC-FM (File No. BRH-830401DH), licensed to Tetco Inc.; and in Wichita Falls, KFDX-TV (File No. BRCT-830308KN), licensed to Clay Broadcasting Corp. of Texas. In addition, although the petitioners initially challenged the license renewal applications of Stations KTWS-TV and KRLD in Dallas and Station KMID-TV in Midland, Texas, the petition against these stations was dismissed pursuant to their own request, and each station's license was ultimately renewed subsequent to a thorough review of its EEO performance. The petition also challenged the renewal applications of Pyle Communications of Beaumont, Inc. for Stations KTLK and KWIC(FM). However, the Commission's staff has requested additional information which has not yet been analyzed. Therefore, we shall consider the allegations against those stations in a subsequent Order.

[2] All submissions not authorized by Section 1.45 of the Commission's Rules will be considered only to the extent required by our public interest mandate.

[3] Initially, the petition was supported only by the affidavit of Pluria Marshall, who is Chairman of the National Black Media Coalition (NBMC) and a resident of Washington, D.C. On September 23, 1983, NBMC submitted the affidavits of Dr. John Warfield, Chairman of the Austin Black Media Coalition, and Rosie Wilson, President of the NAACP in Lubbock. Further, NBMC explained that the late filing was caused by a temporary staff shortage.

[4] Nevertheless, these stations' applications are before us because of their employment profiles. Section 0.283(b)(1)(iii) of the Commission's Rules. Similarly, the ALF opposition is not supported by the affidavit of anyone who has demonstrated party in interest status. Accordingly, ALF has not established that it has standing.

73.2080) or policies with respect to Blacks and other minorities.[5] The petitioners, therefore, request that the Commission investigate the EEO practices of the challenged stations; designate their applications for an evidentiary hearing; permit them to intervene;[6] and deny each of the applications.

4. Section 73.2080 of the Commission's Rules requires broadcast licensees to refrain from employment discrimination and to establish and maintain an affirmative action program which results in positive and continuing efforts to recruit, employ and promote qualified women and minorities. In assessing a licensee's compliance, the Commission first compares a station's employment profile to the available labor force. If that comparison reveals a reasonable relationship between the percentages of women and minorities on the station's staff and their presence in the available labor force, the station's EEO program is reviewed for completeness. However, if that comparison reveals that the percentage of women or minorities on the station's staff is less than the applicable processing criteria,[7] or if the employment practices of the station are challenged, the station's EEO program, its Annual Employment Reports, and any other relevant and material information concerning its employment practices are analyzed. When the information available indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. However, when that information indicates that any protected group is not being afforded equal opportunities in employment and that the cause is a faulty EEO program or an insufficient effort to implement that program, we order appropriate remedial sanctions. *E.g., Provident Broadcasting Company*, 91 F.C.C. 2d 1247 (1982). Further, when the cause of an unreasonably low female or minority presence cannot be determined, we conduct an inquiry or an

[5] Although the petitioners did not challenge the licensees' employment practices with respect to women, we have examined them (see Appendix) and set forth our findings with respect to those licensees whose employment reports initially raised questions about the stations' performance.

[6] Section 1.223 of the Commission's Rules does not provide for consideration of a petition to intervene unless and until an application has been designated for a hearing. Since none of the challenged stations' applications is being set for hearing by this Order, we shall deny the petitioners' request to intervene.

[7] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing criteria for a routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose female or minority employment did not reflect at least 50% of their percentage in the available labor force overall and 25% in the upper-four job categories. By Public Notice, FCC 80-61, dated February 13, 1980, 46 R.R. 2d 1693 (1980), these processing guidelines were extended to stations with five to 10 full-time employees. Further, the Commission revised the processing guideline for the upper-four job categories to 50% for stations with 11 or more full-time employees.

investigation. Finally, of course, if we find that a substantial and material question of fact exists, we designate the application for an evidentiary hearing. 47 U.S.C. §309; *Rust Communications Group*, 53 F.C.C. 2d 355 (1975). Thus, as the foregoing shows, the determinative factors in our evaluation of a station's employment practices are not merely the station's employment statistics but the thoroughness of its EEO program and the good faith efforts undertaken to make that program work. *Chicago Metropolitan Stations*, 89 F.C.C. 2d 1031 (1982).

5. Applying the foregoing principles, we have evaluated the stations' submissions in light of the petitioners' arguments and the relevant labor force data for women and minorities,[8] and we find that although the minority employment statistics for the following stations were below the Commission's processing guidelines, their EEO performance during the license term has generally complied with our EEO rule and policies. Accordingly, although we have advised various licensees to take corrective action, we find that the following stations warrant no further inquiry or administrative sanctions.

(a) KBUC/KBUC-FM, San Antonio.

The San Antonio labor force has 43.4% women and 49.2% minorities (41.9% Hispanics and 6.2% Blacks). Review of the stations' 1983 Annual Employment Report shows that the twenty-three full-time employees included five (21.7%) minorities, all Hispanics, and that the twenty-one upper-level job category employees included four (19.0%) minorities. In addition, the stations' previous license term employment reports show that minority employment both overall and in the upper-four job categories was consistently less than 50% of parity. However, the stations' employment reports also show the following: in 1981 the stations employed nine professionals part-time including four Hispanics; in 1982 four of the twelve professionals employed part-time were Hispanics; while in 1983 three of the eight professionals employed part-time were Hispanics. In addition, the licensee's submissions show that minority employees have occupied professional and managerial positions at the stations throughout the license term.[9] Thus, while the stations' level of full-time minority employment was below the Commission's processing guidelines, the level of overall minority employment was reasonable.

It also appears that the EEO program is adequate. During the year prior to the submission of their renewal applications, the stations contacted the San Antonio chapter of the NAACP (no referrals), the state employment service (two referrals), and two local universities with significant minority enrollment (four referrals). As a result of these efforts, the licensee hired three persons, including one minority. Further, the stations provided on-the-job training to several employees, resulting in the promotion of two females to full-time positions. Finally, even though the licensee believes that a sufficient number of qualified minorities and women are applying for

[8] Labor force figures for the Texas markets were obtained from the Texas Employment Commission issued in January 1983.

[9] In its opposition, the licensee states that the stations' Chief Accountant, Chief Engineer, and Office Manager are all Hispanics. In addition, the petitioners acknowledge that the stations' 1981 full-time staff. included a Black female professional.

available positions, it proposes to expand its recruitment sources to include additional contacts with minority groups. In view of the above, we find no evidence to support the petitioners' charges that the stations' employment record is among the worst in Texas and that the licensee is a "bad actor." Nevertheless, given the general absence of Blacks from the stations' staff, the licensee is advised to examine its EEO program to ensure that it includes recruitment sources likely to produce Black applicants. *See Chicago Metropolitan Stations, supra* at 1036.

(b) KYKS(FM), Lufkin.

Statistics for Lufkin indicate that the labor force includes 20.2% minorities of whom 14.2% are Black and 5.5% are Hispanic. The station's employment profile, gleaned from its 1983 employment report, reveals a full-time staff of fifteen employees, one (6.7%) of whom was a Black technician, and thirteen employees in the upper-four job categories, including the one (7.8%) Black. Similarly, the station's other license term employment reports show that it employed one Black in an upper-level position throughout the license term. Thus, the station's overall level of minority employment was slightly below the Commission's processing guidelines throughout the term.

Review of the licensee's EEO program reveals that the station contacted and obtained referrals from several recruitment sources including area representatives of the NAACP. The licensee also states that it asked individual leaders of the local Black and Hispanic communities to refer potential job applicants. Consistent with these efforts, the station's eleven hires during 1982 included one (9.1%) minority. Finally, we note that the station hired a Black women on March 12, 1984 as a Public Affairs Director and News Reporter. Thus, the station's upper-level staff of fifteen employees now includes two Blacks.[10] Given these efforts we find that the station's overall record raises no question warranting further inquiry. Nevertheless, we advise the licensee to examine its EEO program to ensure that Hispanics are fairly considered for positions at the station. *Chicago Metropolitan Stations, supra* at 1036.

(c) KYKX(FM), Longview.

Comparison of the station's staff with the Longview-Marshall MSA labor force of 23.7% minorities (20.5% Blacks, 2.2% Hispanics, and 1.0% others) shows that the station employed eighteen persons full-time including one (5.6%) minority and seventeen persons in the upper-four job categories including the one (5.9%) minority, a Black male professional. Previous reports also show that the station's staff included a minority in an upper-level job position throughout the license term. *See* Appendix. Review of the licensee's EEO program shows that it contacted the Dallas Urban League, received sixty-four referrals from several recruitment sources including Wylie College, a Black college in Marshall, and hired seventeen persons during 1982 including two (11.8%) minorities. As further evidence of its EEO efforts, the licensee points out that the station's 1984 Annual Employment Report now shows seventeen full-time employees including two (11.8%) minorities (both of whom are Black), and sixteen upper-four category-employees including the two (12.5%) Blacks.[11] In light of the above, no further inquiry is warranted. However, we

[10] Since it appears that positive EEO efforts were made throughout the license term, consideration of post-term activities is appropriate. *Rust Communications Group Inc.*, 73 F.C.C. 2d 39, 54 (1979).

[11] Since we find that a nexus exists, albeit tenuous, between the station's license term efforts and its post-term performance, we are considering the 1984 statistics. *Rust Communications Group Inc., supra* note 10.

admonish the licensee for its lackluster performance during the license term, and we caution it to review its EEO program continuously to ensure that minorities are fairly considered for all positions at the station.

(d) KLRU-TV, Austin.[12]

The Austin MSA labor force includes 25.1% minorities (15.4% Hispanics, 8.3% Blacks, and 1.4% others). A review of the station's 1983 Annual Employment Report indicates that the full-time staff of forty-four persons included two (4.5%) Hispanic females, while its upper-level staff of thirty-two persons also included the two minorities.[13] The station's EEO program indicates that it received fifteen referrals from the Austin Urban League and that it contacted several other Black and Hispanic organizations. In addition, the station provided an internship and work-study program with a local university. As a result of its efforts, the station hired eighteen persons of whom three (16.7%) were minorities. Further, it promoted eight employees including two Hispanics. While acknowledging that the station's minority employment statistics did not meet the Commission's processing criteria, the licensee argues that its good faith efforts prior to the filing of the petition evidence an effective EEO program. In this regard, the licensee notes that it hired two Blacks; it offered two Black females full-time positions;[14] and it promoted a Hispanic female on the part-time staff to a full-time professional position. Finally, the licensee points out that its recruitment sources for Blacks were being expanded. In view of all the foregoing, the licensee's EEO performance appears adequate.

(e) KEAN/KEAN-FM, Abilene.

The Abilene MSA includes 43.6% women and 14.7% minorities of whom 9.9% are Hispanic and 4.8% are Black. Review of the stations' 1983 Annual Employment Report reveals that the full-time staff of twenty-one employees included one (4.8%) minority while the upper-level staff of nineteen employees also included the one minority, a Hispanic male professional. Moreover, the stations' previous employment

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[12] By letter dated February 25, 1981, the Commission granted the station a short-term renewal to April 1, 1982, due to a finding that the licensee had broadcast false and misleading statements in connection with on-air fund raising activities. On January 6, 1983, the Commission granted Station KLRU-TV a renewal of license (File No. BRET-811201LC) for the period beginning April 1, 1982, and ending August 1, 1983. Since the license was granted subsequent to a thorough review of the station's EEO performance, the employment period considered under the present renewal application extends only from April 1, 1982 to August 1, 1983.

[13] We note that the 1983 statistics show that the station's part-time staff included 15 upper-level employees of whom five (33.3%) were minorities. In this regard, the licensee explains that although the five minority employees were classified as part-time workers in accordance with their union contract, they actually worked 10 to 11 months out of the year on a full-time basis. Thus, the licensee argues that these employees should actually be classified as full-time employees. Consistent with this argument, the licensee classified the five minorities as full-time employees on the station's 1984 Annual Employment Report. As a result, the station's 1984 statistics show that minorities make up 17.9% (10 out of 56) of the overall staff, and 19.5% (eight out of 41) of the upper-level staff.

[14] The licensee indicates that one Black female, who was a part-time professional, was offered a managerial position but opted to retain her part-time status in order to pursue post-graduate work at a local university. The other Black female accepted a position as an accounting clerk but later declined the position upon accepting employment elsewhere at a higher level of pay.

profiles throughout the license term reflect one minority, a Hispanic professional. According to the licensee's EEO program, it obtained referrals from various recruitment sources that include LULAC, the Mexican American Chamber of Commerce, and the Black Chamber of Commerce. However, none of the fourteen persons hired by the licensee during the year prior to the submission of the renewal applications were minorities. In this regard, the licensee acknowledges that an insufficient number of minorities are applying for jobs.[15] While the stations' affirmative action efforts during the license term were somewhat tenuous, we are encouraged by the 1984 Annual Employment Report which shows that three of nineteen (or 15.8%) full-time employees are minorities and that two of seventeen (or 11.8%) upper-level employees (a Black and Hispanic who are both professionals) are minorities. *See Rust Communications Group Inc., supra* note 10.

Given the above, we find that further no administrative action is necessary at this time. However, in view of the licensee's mediocre EEO performance during the license term, we caution it to evaluate regularly its recruitment sources and hiring techniques to assure that qualified minority applicants are considered for all available positions.

6. The following stations' EEO performance indicates that the licensees did not fully comply with the Commission's EEO rule during the 1980-1983 license term. Employment of minorities was consistently below the Commission's processing guidelines and the EEO programs revealed few practices or techniques which could be viewed as likely to increase the flow of minority applicants. Thus, although many of the stations reported increases in minority employment in 1984, we believe the pattern of post-term changes is a direct consequence of the petitioners' challenge since there appears to be no reason why this post-term level of performance could not have been achieved during the license term. Accordingly, we are considering the 1984 figures only to fashion the appropriate remedy. *Northern Television Inc.*, 91 F.C.C. 2d 305, 324 (1982), *aff'd, Alaskans for Better Media* v. *Federal Communications Commission*, No. 82-2144 (D.C. Cir. May 16, 1984).

(a) KIPR/KIPR-FM, Diboll.

The stations' 1983 Annual Employment Report shows thirteen full-time employees including one (7.7%) minority, a female listed in the Office and Clerical category, and twelve upper-level employees, none of whom were minorities. Previous employment reports for the license term show fourteen full-time employees with no minority employees in 1982 and one minority employed in an upper-four job position in 1981.

[15] In addition, the licensee points out that "memos and verbal instructions are given to its employees requesting them to seek out minorities and women for recruitment," and that "business and cash donations are given to three different universities." However, we have found that similar activities do not necessarily promote a positive affirmative action program. First, with respect to the verbal instructions, there is no indication of any follow up, especially to an all-white workforce, to suggest that this technique is likely to result in minority referrals. *See Triple R Broadcasting*, 42 R.R. 2d 907, 908 (1977). Regarding the cash donations, we believe that this assistance has little, if any, relevance to a station's EEO performance, particularly where the donations are not directed toward the betterment of minorities.

See Appendix. Given Diboll's 20.1% minority labor force (14.2% Black and 5.5% Hispanic), the petitioners argue that the stations' employment reports demonstrate that the licensee did not comply fully with our EEO rule. Further, the petitioners claim that the licensee discriminated against a former Black employee and they submit his affidavit in support of their claim.[16] Accordingly, the petitioners argue that a hearing is mandated.

The licensee's EEO program reveals that it utilized only one source specifically oriented to minority referrals. Nonetheless, the licensee states that during 1982 it either interviewed or discussed employment with nine Black applicants, and that three of the twenty-five (12.0%) persons hired during the year were minorities. However, of these, two were hired for clerical positions, while two other minorities, one of whom was apparently included as a hire in 1982, were with the stations for only a very short period as announcer trainees. Accordingly, even though the licensee's 1984 Annual Employment Report shows that its full-time staff of fifteen now includes three (20.0%) Blacks, and its upper-level staff of thirteen includes two (15.4%) minorities,[17] we are not convinced that its license term performance was as affirmative as our rule envisions. Thus, although we are encouraged by the post-license term performance, we shall impose reporting conditions. *Media-Com, Inc.*, FCC 84-70, 55 R.R. 2d 1291, 1295-96 (1984).

(b) KSEL/KSEL-FM, Lubbock.

The Lubbock MSA labor force includes 43.1% women and 24% minorities of whom 6.5% are Black, 16.4% are Hispanic, and 1.1% are others. Analyzing the stations' license term employment reports, we find that although the total full-time staff has fluctuated from eighteen in 1981 to twenty-two in 1982 to fourteen in 1983, they all reflect only one minority; thus, the stations maintained a minority presence of 7% or less throughout the license term. In the upper-four job categories, the stations' amended 1983 Annual Employment Report[18] shows that of eleven persons, one (9.1%) was a minority, while their prior reports reveal an absence of minorities in these positions.[19] Thus, throughout the license term, the stations' levels of minority employment both overall and in the upper-level jobs were outside our processing guidelines.[20]

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[16] The former employee, a Mr. Gilbert Fears, cites "incidents" and "circumstances" which, he believes, support a conclusion that his termination was because of his race. In addition, Mr. Fears submitted a second affidavit in response to the licensee's claims regarding his performance. However, in our view, Mr. Fears' affidavits do not raise a substantial question that he was a victim of prohibited discrimination.

[17] In addition, the licensee states that its part-time staff of six is composed of three minorities including a Hispanic male who is currently being trained "on-the-air."

[18] The 1983 Annual Employment Report originally submitted by the licensee did not list any minorities in upper-four positions. However, the licensee states in its opposition pleading that its Hispanic female employee was inadvertently misclassified in the Office and Clerical category, whereas she should have been classified as a salesworker. Accordingly, the licensee filed an amended Annual Employment Report on September 12, 1983, to correct the error.

[19] In addition, the licensee's employment reports show that in 1983, the stations employed nine persons part-time, all professionals, including one Hispanic, while in 1981 and 1982 they employed six persons part-time in upper-level positions including one Black professional in 1982.

[20] With respect to the licensee's employment of women during the license term, female representation on the overall full-time staff increased from 33.3% in 1981 to 40.9% in

The licensee's EEO program lists several minority recruitment sources; however, none of them made applicant referrals. Nevertheless, three of the eighteen (16.7%) hires during the year ending February 12, 1983, were minorities. Further, the licensee states that it employed three Blacks who were not reflected on its Annual Employment Reports: a Black announcer who worked at the stations throughout 1980 but then resigned in January 1981 to take a job with a Dallas television station; a Black salesman who worked for six months in 1981 and then resigned; and a Black female who was hired in July of 1983 full-time as a "Traffic Director/Production Director Assistant/Receptionist." The licensee, however, acknowledges that its EEO program is not producing an adequate number of qualified minority applicants. Therefore, it proposes to expand its recruitment efforts by contacting local churches with large minority memberships and by holding seminars with officers of local civic organizations in order to inform them of job openings at the stations.

Although the petitioners question the licensee's mistaken classification of a salesperson as a clerical office, they submit no information indicating that the licensee's ultimate classification was improper. Accordingly, no further inquiry is warranted. Moreover, in light of the licensee's willingness to hire minorities, we do not believe that any substantial and material question of fact exists. Nonetheless, we are concerned with the absence of Hispanics from the stations' upper-level jobs throughout the majority of the license term, particularly in light of the 16.4% Hispanic presence in the available labor force. In addition, we are mindful that the stations' Annual Employment Reports from 1978 through 1982 show that no minorities were employed in full-time upper-level positions. Therefore, we believe it appropriate to monitor the licensee's EEO performance to assure ourselves of its full compliance with our EEO rule. Accordingly, reporting conditions will be imposed.

(c) KTSM/KTSM-FM, El Paso.

By way of background, because of the stations' inadequate EEO efforts in seeking out and employing Hispanics during the 1977-1980 license term, the licensee was required to submit a revised EEO program with goals and timetables for hiring Hispanics, and reporting conditions were imposed. By Direction Letter, dated October 21, 1980. Pursuant to the Commission's Order, the licensee proposed to have five Hispanic employees by the end of the license term.

The El Paso MSA labor force includes 42.4% women and 64.5% minorities (Hispanics make up 60.4% of the labor force). The stations' 1983 Annual Employment Report shows that of the sixteen full-time employees, four (25.0%) were women and seven (43.8%) were Hispanics. Of the thirteen persons listed in the upper-four job categories, only one (7.7%) was a woman and four (30.8%) were Hispanics. In addition, the stations' previous license term employment reports show that the level of Hispanic representation on the full-time staff increased from two of thirteen (15.4%) in 1981 to six of nineteen (31.6%) in 1982, while Hispanic representation in the

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1982 to 42.9% in 1983, while in the upper-four job categories, female representation fluctuated from 20.0% in 1981 to 18.8% in 1982 to 27.0% in 1983. Thus, although the percentages of women on the licensee's overall staff were well above our processing guideline, their representation in the upper-four job categories remained slightly below our guideline for the majority of the license term. Nevertheless, the licensee's EEO program reveals that its contacts with a women's organization produced three referrals, and that as a result of these efforts, five of the eighteen (27.8%) persons hired during the year prior to submitting its renewal application were women. Further, the licensee trained and promoted women. Accordingly, we are satisfied that the licensee has complied with our EEO policies with respect to women.

top-four job categories increased from two of twelve (16.7%) in 1981 to four of seventeen (23.5%) in 1982. *See* Appendix.

The licensee's first detailed report shows that from October 21, 1980 to December 1, 1981, the stations hired six persons (five full-time and one part-time), two of whom were women and three of whom were Hispanics. The licensee notes that all three Hispanics were referred to the stations by former employees. The stations' second employment report filed with its renewal application shows that from December 1, 1981 to March 1, 1983, they hired ten persons (eight full-time and two part-time) and filled seven upper-level positions. The hires included four women (one for an upper-level position) and four Hispanics (one for an upper-level position). With respect to the Hispanic hires, the licensee notes that two were former employees, one was referred to the stations by an employee, and one learned about the opening after talking to a station employee. Although the stations' reports failed to provide details concerning the recruitment sources used to fill the above-noted positions, their EEO program and opposition pleading point out that several minority recruitment sources were routinely contacted.

In addition, the licensee's submissions indicate the following: that as a result of a training program operated in conjunction with a local university, the stations expected to hire a Hispanic male trainee in August 1983 as a full-time salesman; that a Hispanic full-time engineer who has worked with the licensee since 1978 is being assigned to stations KTSM/KTSM-FM and will hereafter be reflected on the stations' annual employment reports; and that during the twelve month period ending February 15, 1983, the stations hired five persons full-time of whom three were minorities and two were women. Finally, the licensee notes that although a former employee filed an employment discrimination complaint against it with the Equal Employment Opportunity Commission, the charge was subsequently dismissed.[21] Accordingly, given all of the above, we are satisfied that no substantial and material question of fact exists.

We are concerned, however, with the stations' apparent inattention to its affirmative action obligations with respect to women. In this regard, the number of women in upper-four jobs declined from three of seventeen (17.6%) in 1982 to one of thirteen (7.7%) in 1983 and 1984. In addition, the second detailed employment report referenced above shows that women are the lowest paid employees on the stations' full-time staff, with the one woman categorized as an upper-level employee as the second lowest paid full-time employee. Finally, it appears that of the twelve full-time upper-four level new hires during the license term, only two were women. Accordingly, we find it necessary to continue reporting conditions. *See Renewals of Indiana, Kentucky and Tennessee Broadcast Stations*, FCC 83-574, 54 R.R. 2d 1473 (1983).

(d) KFDX-TV, Wichita Falls.

The Wichita Falls MSA labor force includes 15.3% minorities. (7.6% of the total labor force are Black, 6.0% are Hispanic, and 1.7% are others). The station's license term employment reports show that the size of the workforce varied between forty-eight and fifty full-time employees overall. Of these, the station employed three (6.0%) minorities in 1981, four (8.3%) minorities in 1982, and four (8.2%) minorities in 1983.

[21] The licensee informs us that the employee in question was fired after it was determined that "she was not performing up to company standards for the position." The licensee also states that after the charge was filed with the EEOC, it entered into a settlement agreement in order to avoid protracted litigation.

The licensee's reports show that forty-one persons were employed in the upper-four job categories each year, yet only one (2.4%) was a minority in 1982, and two (4.9%) were minorities in 1981 and 1983. The petitioners charge that "the station's EEO program could not possibly be more neutral," and they contend that there is nothing in the EEO program to suggest that the station has done anything to comply with the Commission's EEO rule.

The licensee's EEO program indicates that it proposes to utilize local minority and women's recruitment sources, however, it does not reveal the names of any of the minority sources contacted or the number of referrals received from these sources. Nevertheless, the licensee states that it maintains an Equal Employment Opportunity Forum made up of minority community leaders, and it declares that a primary objective of this forum is to help recruit minority applicants. The licensee notes that the EEO Forum has helped the station recruit and hire unskilled minorities who were then trained in news production and that it helped establish the station's news internship program. As a result of the internship program, the licensee states that in 1982 it promoted two part-time minority employees to full-time status.[22] Finally, during 1982, the licensee hired sixteen persons, two (12.5%) of whom were minorities.

Thus, the licensee appears willing to hire, train, and promote minorities. However, in view of the station's large staff and the number of hiring and training opportunities, we are concerned about the station's actual effort in this regard. We note that the station's 1984 Annual Employment Report shows that the number of minorities in upper-level positions has remained constant despite an increase in staff size from forty-one employees to forty-six employees. In addition, the number of minorities on the station's full-time staff declined from four to three despite an increase in the size of the overall staff from forty-nine to fifty-three. Further, since the licensee did not indicate the number of applicant referrals from each recruitment source as instructed in part IV of the EEO Program Guidelines, it is difficult to assess the productiveness of the station's EEO program. Accordingly, we believe that it is necessary to monitor the licensee's implementation of its program. Therefore, we shall require employment reports. In addition, we advise the licensee to submit all information requested in the station's renewal application and EEO reports. *Baltimore Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1183, 1192 (1982).

(e) KFYO, Lubbock.

The Lubbock MSA labor force includes 43.1% women and 24% minorities (see para. 6(c)). An examination of the station's most recent license term employment report submitted with its renewal application reveals a staff of nineteen full-time employees including one (5.3%) Hispanic, and eighteen persons in the upper-four job categories, none of whom were minorities. Moreover, of the eight part-time employees, none was a minority. Although prior license term Annual Employment Reports show two Hispanic women, one of whom was classified as an Official and Manager, the licensee's employment statistics suggest that few minorities have worked at the station. In addition, the licensee's EEO program appears less than affirmative. In this regard, the three minority oriented recruitment sources listed show no referrals. Based on our review of the EEO programs of other Lubbock stations, it appears that the licensee has not contacted other, seemingly more productive, sources. Hence, we find unpersuasive the licensee's explanation that it does not receive sufficient minority applicants because of the presence of a Spanish formatted radio station in

[22] One Black employee was promoted from a part-time position in production to a full-time reporter-photographer, while a Hispanic employee who worked part-time with newsroom equipment was promoted to a full-time position.

Lubbock.[23] Moreover, by the station's own admission, there was a high employee turnover rate and thus ample hiring opportunities. During the twelve month period beginning March 1, 1982 and ending February 28, 1983, twenty-two persons were hired of whom only one was a minority. Thus, we disagree with the licensee's conclusion that it "... has an aggressive affirmative action program." Accordingly, while we believe that there is no evidence of intentional discrimination, more effort must be undertaken to attract qualified minority applicants for all available openings.[24] Therefore, to assure ourselves that affirmative efforts are continually undertaken, we shall grant the license for less than a full term to February 1, 1987, and require the submission of periodic EEO progress reports.

(f) KRLB/KRLB-FM, Lubbock.

At the time of the filing of the stations' license renewal applications, the stations employed twenty-five persons, of whom one (4.0%) was a minority, in comparison to the 24% minority presence in the labor force. Prior employment reports, as corrected,[25] show a Hispanic female office worker on two 1983 reports and no minorities on the stations' full-time staff in 1981 and 1982.[26] However, according to the licensee, the stations have employed four minorities at various other times during the license term, although it appears that none of these persons was employed for more than four months. Finally, the licensee states that as of the close of the license term, its staff of thirty-one employees (nineteen full-time and twelve part-time) included a Black male and a Hispanic male on the part-time air staff.[27]

Analysis of the stations' EEO program reveals that the licensee did not contact any minority recruitment sources throughout the license term.[28] Thus, although the program shows that three of the twenty-one (or 14.3%) persons hired during the twelve month reporting period were minorities, it is also acknowledged that a sufficient number of qualified minorities are not applying for available positions. The licensee therefore proposes to expand its recruitment efforts to include several organizations and institutions with significant Black and Hispanic membership.

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[23] In this regard, we have always held that the presence of a local station with a minority format does not absolve a licensee from further responsibility to seek out minority job applicants. *Louisiana and Mississippi Broadcast Renewals*, 94 F.C.C. 275, 284 (1983). In this case, in particular, it is implausible that the Spanish language station, which has only nine full-time employees overall and five employees in upper-four jobs, has made it difficult for the licensee to recruit qualified minorities.

[24] We have examined the licensee's employment profiles and practices regarding women and we find that they are in compliance with our EEO policies despite 1982 employment figures showing that women filled only 17.6% of the upper-four job category positions.

[25] In its opposition, the licensee explains that although it has employed a Hispanic female Office and Clerical worker full-time since February 1982, it inadvertently omitted her from one of the 1983 employment reports.

[26] A Hispanic male is listed as one of five professionals employed part-time in 1982. According to the licensee, he worked at the stations from September 1981 to May 1982.

[27] The licensee states that both minorities were offered full-time positions which they declined "due to other activities."

[28] According to the licensee, the only source of minority applicants and employees has been the Mass Communications Department of Texas Tech University; however, the licensee tacitly admits that these persons are part-time employees who work only for a limited time.

In light of the licensee's having hired and employed minorities, we do not believe that a substantial and material question of discrimination exists.[29] However, the low level of minorities in upper-level positions throughout the license term and the failure to utilize minority recruitment sources causes us to question the licensee's affirmative action efforts. Therefore, we shall grant the license renewal for less than a full term to February 1, 1987, and reporting conditions will be imposed in order to monitor the licensee's EEO efforts.[30]

(g) KTON/KTON-FM, Belton.

The Kileen-Temple MSA, of which Belton is a part, includes 47.7% women and 21.1% minorities (10.1% Black, 8.7% Hispanic, and 2.3% other). The stations' 1983 Annual Employment Report lists seventeen full-time employees, including five (29.4%) women and one (5.9%) Black, and fifteen employees in the upper-four job categories, three of whom are women and none of whom are minorities. Prior employment reports include only two women in the upper-four job categories, and only one minority on the stations' full-time staff, a Black female employed in an Office and Clerical position. Thus, the stations' employment profile for women in upper-level positions remained below the Commission's processing guideline throughout the 1980-1983 term, and the stations employed only one minority in a lower-level position throughout the license term. *See* Appendix.

Review of the EEO program reveals that the stations' efforts during the license term were marginal. In this regard, although the licensee points out that several conventional recruitment sources were contacted, no minority-oriented recruitment sources were utilized during the license term. Moreover, of the twenty persons hired during the twelve month period ending March 31, 1983, none were minorities. In mitigation, the licensee states that the stations are in a small market and that it maintains a small staff, thus limiting its ability to attract additional female and minority employees. However, in light of the 21.1% minority presence in the labor force, we are not persuaded by this argument.

Given the absence of evidence of intentional discrimination, we do not believe that a substantial and material question of fact exists which would warrant a hearing.[31] Nevertheless, we believe that a grant of the licenses for a full seven year term is not appropriate, and that reporting conditions are necessary in order to assure ourselves

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[29] In this regard, we also note that the stations' employment profiles with respect to women show that although the overall employment of women in full-time positions has generally met the Commission's processing guidelines, female representation in upper-level positions has often been low. However, female representation in upper-level positions did improve from none of eight in 1981 to one of 14 (7.1%) in 1982 to three of 20 (15.0%) in 1983. The EEO program shows that the licensee contacted a female recruitment source, but that no referrals were obtained. Nevertheless, during the one year period ending March 1, 1983, the stations' 21 hires included 10 women. Hence, we find that the stations' overall efforts to hire females are satisfactory.

[30] In addition, we advise the licensee that the instructions accompanying the Annual Employment Report state that a payroll period in January, February, or March is to be used and that the same payroll period is to be used for each year's report. *See Baltimore Metropolitan Stations*, supra.

[31] In this regard, the licensee notes that a former employee filed a sexual discrimination complaint against the stations with the EEOC. However, the charge was subsequently dismissed on July 20, 1983.

that the licensee is complying with the Commission's rules.[32] Accordingly, we shall grant renewal for a short-term to February 1, 1987, and shall require progress reports so that we can review fully at an early date the licensee's EEO performance. *See, e.g., Louisiana/Mississippi Broadcast Stations, supra* at 284.[33]

7. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition and others IS DENIED AND/OR DISMISSED; and when considered as an informal objection IS DENIED.

8. IT IS FURTHER ORDERED, That the renewal applications for Stations KBUC, KBUC-FM, KYKS(FM), KYKX(FM), KLRU-TV(ED), KEAN, and KEAN-FM ARE GRANTED.

9. IT IS FURTHER ORDERED, That the license renewal applications for Stations KIPR, KIPR-FM, KSEL, KSEL-FM, KTSM, KTSM-FM, and KFDX-TV ARE GRANTED, subject to the EEO conditions specified herein.

10. IT IS FURTHER ORDERED, That the license renewal applications for Stations KFYO, KRLB, KRLB-FM, KTON and KTON-FM ARE GRANTED FOR A SHORT-TERM ending February 1, 1987, subject to reporting conditions specified herein.

11. IT IS FURTHER ORDERED, That the licensees of Stations KIPR, KIPR-FM, KSEL, KSEL-FM, KTSM, KTSM-FM, KFDX-TV, KFYO, KRLB, KRLB-FM, KTON, and KTON-FM are directed to file an original and one copy of the following information within thirty days from the release of the Order and then on October 1, 1985 and October 1, 1986.[34]

(a) a list of all persons hired as well as all persons who applied for each position filled during the twelve months preceeding September 15, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;

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[32] We note that on August 3, 1984, Tetco, Inc., the licensee of Stations KTON and KTON-FM, filed an application to assign the stations' licenses to Center City Communications, Inc. The assignee is new to broadcasting, and its proposed EEO program comports with the Commission's EEO rule. Thus, although Tetco Inc.'s license renewal applications will only be granted for a short-term, in the event that the assignment of the stations' licenses is consummated, the new owner will be granted a full-term license without EEO conditions.

[33] We would have also required that the licensee submit minority hiring goals; however, because of the stations' 1984 employment report, which shows 14 full-time employees including three (or 21.4%) minorities and 13 upper-level employees including two (or 15.4%) minorities, we believe this remedy would serve no purpose. *E.g., KHVH, Inc.*, 77 F.C.C. 2d 890, 894 (1980).

[34] Upon submission of the third report, the Commission will review the licensees' EEO performance, and if we determine that the licensees have developed an effective EEO program, no further reports will be required.

(c) a narrative statement detailing the efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of minority applicants (in the case of KTSM and KTSM-FM, sources used for the purpose of increasing the stations' pool of female applicants should be identified); and

(d) a list of all promotions during the twelve months preceeding September 15, showing the former and subsequent positions, date of promotion, and the sex and race or national of the person promoted.

12. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[35]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Unconditional Grants

FEMALE AND MINORITY EMPLOYMENT PROFILES

	Overall			*Top Four Categories*		
Station(s)	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
KBUC/KBUC–FM						
1984	23	8 (34.8)	4 (17.4)	22	7 (31.8)	4 (18.2)
1983	23	8 (34.8)	5 (21.7)	21	6 (28.6)	4 (19.0)
1982	24	10 (41.7)	3 (12.5)	23	9 (39.1)	3 (13.0)
1981	25	10 (40.0)	5 (20.0)	24	9 (37.5)	4 (16.7)
50% and 50% of MSA parity		21.7%	24.6%		21.7%	24.6%
KYKS (FM)						
1984	15	6 (40.0)	1 (6.7)	14	5 (35.7)	1 (7.1)
1983	15	6 (40.0)	1 (6.7)	13	4 (30.8)	1 (7.7)
1982	15	6 (40.0)	1 (6.7)	14	5 (35.7)	1 (7.1)
1981	13	6 (46.0)	1 (7.7)	12	5 (42.0)	1 (8.3)
50% and 50% of county parity		20.2%	10.1%		20.2%	10.1%

[35] The affected licensees may contact the EEO Branch of the Mass Media Bureau's Enforcement Division (202-632-7069) for information on the preparation of employment reports. In this regard, we advise the licensee that it need not submit the names of the persons referenced in its reports; as indicated, the positions of the persons employed, hired and promoted will suffice.

KYKX (FM)						
1984	17	6 (35.3)	2 (11.8)	16	5 (31.3)	2 (12.5)
1983	18	5 (27.8)	1 (5.6)	17	4 (23.5)	1 (5.9)
1982	17	5 (29.4)	1 (5.9)	16	4 (25.0)	1 (6.3)
1981	16	5 (31.3)	1 (6.3)	13	2 (15.4)	1 (7.7)
50% and 50% of MSA parity		20.8%	11.9%		20.8%	11.9%
KLRU-TV						
1984	56	25 (44.6)	10 (17.9)	41	13 (34.1)	8 (19.5)
1983	44	20 (45.5)	2 (4.5)	32	10 (31.3)	2 (6.3)
1982	47	22 (46.8)	4 (8.5)	34	11 (32.4)	3 (8.8)
1982	46	21 (45.7)	4 (8.7)	33	9 (27.3)	3 (9.1)
50% and 50% of MSA parity		22.4%	12.6%		22.4%	12.6%
KEAN/KEAN-FM						
1984	19	6 (31.6)	3 (15.8)	17	4 (23.5)	2 (11.8)
1983	21	8 (38.1)	1 (4.8)	19	6 (31.6)	1 (5.2)
1982	20	6 (30.0)	1 (5.0)	19	5 (26.3)	1 (5.2)
1981	17	6 (35.3)	1 (5.9)	16	5 (31.2)	1 (6.3)
50% and 50% of MSA parity		21.8%	7.9%		21.8%	7.9%
Reporting Conditions						
KIPR/KIPR-FM						
1984	15	6 (40.0)	3 (20.0)	13	4 (30.8)	2 (15.4)
1983	13	7 (53.8)	1 (7.7)	12	6 (50.0)	0
1982	14	8 (57.1)	0	13	7 (53.8)	0
1981	14	7 (50.0)	1 (7.1)	13	6 (46.2)	1 (7.7)
50% and 50% of county parity		20.2%	10.1%		20.2%	10.1%
KSEL/KSEL-FM						
1984	12	5 (41.7)	2 (16.7)	11	4 (36.4)	1 (9.1)
1983	14	6 (42.9)	1 (7.0)	11	3 (27.0)	1 (9.1)
1982	22	9 (40.9)	1 (4.5)	16	3 (18.8)	0
1981	18	6 (33.3)	1 (5.6)	15	3 (20.0)	0
50% and 50% of MSA parity		21.6%	12.0%		21.6%	12.0%

KTSM/KTSM-FM						
1984	16	4 (25.0)	8 (50.0)	13	1 (7.7)	5 (38.5)
1983	16	4 (25.0)	7 (43.8)	13	1 (7.7)	4 (30.8)
1982	19	5 (26.3)	6 (31.6)	17	3 (17.6)	4 (23.5)
1981	13	2 (15.4)	2 (15.4)	12	1 (8.3)	2 (16.7)
50% and 50% of MSA parity		21.2%	32.3%		21.2%	32.3%
KFDX-TV						
1984	53	13 (24.5)	3 (5.7)	46	10 (21.7)	2 (4.4)
1983	49	14 (28.6)	4 (8.2)	41	9 (22.0)	2 (4.9)
1982	48	16 (33.3)	4 (8.3)	41	12 (29.3)	1 (2.4)
1981	50	15 (30.0)	3 (6.0)	41	12 (29.3)	2 (4.9)
50% and 50% of MSA parity		21.6%	7.7%		21.6%	7.7%
Short-term Renewals						
KFYO						
1984	17	5 (29.4)	3 (17.7)	15	3 (20.0)	1 (6.7)
Ren. App.	19	5 (26.3)	1 (5.3)	18	4 (22.2)	0
1983	20	6 (30.0)	2 (10.0)	19	5 (26.3)	1 (5.3)
1982	18	4 (22.2)	2 (11.1)	17	3 (17.6)	1 (5.9)
1981	19	5 (26.3)	2 (10.5)	18	4 (22.2)	1 (5.5)
50% of MSA		21.6%	12.0%		21.6%	12.0%
KRLB-KRLB-FM						
1984	29	10 (34.5)	4 (13.8)	26	7 (26.9)	1 (3.8)
Ren. App.	20	7 (35.0)	0	17	4 (23.5)	0
1983	23	6 (26.1)	1 (4.3)	20	3 (15.0)	0
1982	16	3 (18.8)	0	14	1 (7.1)	0
1981	10	2 (20.0)	0	8	0	0
50% and 50% of MSA parity		21.6%	12.0%		21.6%	12.0%
KTON/KTON-FM						
1984	14	3 (21.4)	3 (21.4)	13	2 (15.4)	2 (15.4)
1983	17	5 (29.4)	1 (5.9)	15	3 (20.0)	0
1982	17	5 (29.4)	1 (5.9)	14	2 (14.3)	0
1981	19	5 (26.3)	1 (5.3)	16	2 (12.5)	0
50% and 50% of MSA parity		23.9%	10.6%		23.9%	10.6%

October 17, 1984

STATEMENT OF COMMISSIONER HENRY M. RIVERA DISSENTING IN PART

RE: License renewal applications of certain broadcast stations serving communities in Texas

I dissent to the unconditional renewal of the licenses for Stations KYKX(FM), KLRU(TV) and KEAN/KEAN(FM). Not only were each of these stations outside the Commission's processing guidelines for the entire license term, but their efforts to recruit and retain minorities were less affirmative than they should have been.[1] In view of such performance, these stations were not entitled to the vote of confidence the majority articulated by giving them an unconditional, seven year license renewal. Reporting conditions should have been imposed to see whether the sudden progress made by these stations after the petition to deny was filed is sustained.

[1] I recognize that there may be room for disagreement in the case of KLRU(TV). The licensee's Annual Employment Reports indicate that KLRU(TV) was well outside the processing guidelines for the entire license term. While its affirmative action efforts include training programs and continuing liaison with minority-oriented recruitment sources, KLRU(TV)'s employment statistics suggest that something more than these measures is necessary to assure a representative workforce at the station. According to the licensee, its term-time performance was better than indicated in the Form 395s; five minority employees who were classified as part-time employees worked full-time most of the last year of the license term. The Mass Media Bureau did not pursue this issue with the licensee. If the Bureau had shown that the station's position was well-founded, then I would probably agree that a sanction is inappropriate. However, on the state of the record I cannot make a judgment in KLRU(TV)'s favor.

Application, Amendment of, Substantial Changes
Candor
Financial Qualifications
Law, Violation of, See Also Criminal Prosecution
Ownership and Management, Integration of
Suburban Community 307(b) Issue

In hearing matter of mutually exclusive CP applications for television station in Washington, D.C., Review Board affirmed ALJ's grant. Applicant for Arlington, Va. was not entitled to a 307(b) preference over Washington applicants. Moreover, where applicant was found financially qualified by a new financial proposal at express invitation of ALJ, Board would not remand to explore sufficiency of old proposal.

—*Washington's Christian TV Outreach*
BC Docket No. 81-528

FCC 84R-70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Washington's Christian Television Outreach, Inc. Washington, D.C.	BC Docket No. 81-528 File No. BPCT-5042
Century Communications, Inc. Washington, D.C.	BC Docket No. 81-529 File No. BPCT-800117KE
Capital Communications of Washington, Inc. Washington, D.C.	BC Docket No. 81-530 File No. BPCT-800118KF
Grant Broadcasting Corporation Washington, D.C.	BC Docket No. 81-533 File No. BPCT-80118KK

Urban Telecommunications Corporation Arlington, Virginia	BC Docket No. 81-536 File No. BPCT-800118KN
Washington Television, Inc. Washington, D.C.	BC Docket No. 81-537 File No. BPCT-800118KO
WSCT-TV, Inc. Washington, D.C.	BC Docket No. 81-538 File No. BPCT-800118KP

For Construction Permit for New UHF Television Broadcast Station

Appearances

Dean George Hill and *Riley M. Murphy* on behalf of Washington's Christian Television Outreach, Inc.; *Morton L. Berfield, Lewis I. Cohen,* and *Roy W. Boyce* on behalf of Century Communications, Inc.; *Benito Gaguine, Russell C. Balch* and *Heidi P. Sanchez* on behalf of Capital Communications of Washington, Inc.; *E. William Henry, Jonathan Ginsburg,* and *Harvey J. Shulman* on behalf of Grant Broadcasting Corporation; *James K. Edmundson* on behalf of Urban Telecommunications Corporation; *Louis Schwartz, Robert A. Woods, Steven C. Schaffer,* and *Malcolm G. Stevenson* on behalf of Washington Television, Inc.; and *Michael H. Rosenbloom* and *Barry A. Friedman* on behalf of WSCT-TV, Inc.

DECISION

Adopted: October 2, 1984; Released: October 9, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL.

1. This proceeding involves the mutually exclusive applications of Washington's Christian Television Outreach, Inc. (WCTO), Century Communications, Inc. (Century), Capital Communications of Washington, Inc. (Capital), Grant Broadcasting (Grant), Urban Telecommunications Corporation (Urban), Washington Television, Inc. (WTI), and WSCT-TV, Inc. (WSCT-TV) for authority to construct a new commercial television

broadcast station on UHF Channel 14, Washington, D.C.[1] By *Hearing Designation Order* (*HDO*), 46 Fed. Reg. 43737, published August 31, 1981, these applications (and five others subsequently dismissed) were designated for consolidated comparative hearing on, so far as is relevant to the remaining applicants, limited financial issues against Century, Urban, and WTI, in addition to the standard comparative issue.[2] Subsequently, presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) granted summary decision to WTI and partial summary decision to Century on the designated financial issues (FCC 81M-4113, released December 31, 1981 (ALJ)); added a Section 307(b) issue inadvertently omitted from the *HDO (id.)*[3]; and designated further qualifying issues against Capital and Grant (FCC 82M-1143, released April 9, 1982 (ALJ)). The issues against Capital permitted inquiry into a federal court's finding of sex discrimination against its President, Diane Graham, and the applicant's failure to notify the Commission of the matter. The further issue against Grant sought to determine whether that applicant engaged in misrepresentation by failing to report the bankruptcy of a 25% principal, Lawrence Brailsford.

2. In an *Initial Decision* (*I.D.*), FCC 83D-2, 94 FCC 2d 1369, released 1-24-1983, the ALJ granted the application of WSCT-TV. Grant and Urban were omitted from comparative consideration because neither was found to have established its basic qualifications — Grant because of "the deception its principal, Lawrence Brailsford, undertook to keep the Commission from learning of his bankruptcy," *I.D.*, at para. 181; and Urban because it had not established its financial qualifications. *Id.* Thereafter, upon review of the exceptions to the *I.D.*, and after oral argument on June 28, 1983 before the Review Board, we remanded the proceeding to the ALJ for further limited evidentiary exploration with respect to several matters considered to be potentially decisional: Urban's disqualification under the financial issue; WSCT-TV's integration credit as affected by a financial arrangement it had with Syndicated Communications, Inc. and Syndicated Capital Corp. (collectively Syncom); and WTI's

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[1] This frequency became available when the Commission revoked the license of the previous occupant of the channel, WFAN-TV. *See United Television Co., Inc.*, 46 FCC 2d 698 (1974).

[2] The *HDO* also permitted evidence under the standard comparative issue regarding the comparative geographic and demographic coverage ("areas and populations") of the respective engineering proposals to determine whether a comparative preference should accrue to any of the applicants.

[3] 47 U.S.C. §307(b) requires the Commission to " ... make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The issue was added because of Urban's specification of Arlington, Virginia as its community of license. The other six applicants specified Washington, D.C. *See infra* paras. 18-19.

integration credit in light of allegations that its 53.6% shareholder had previously failed to effectuate an integration pledge made to the Commission. *Washington's Christian Outreach, Inc.*, 94 FCC 2d 1360 (1983) (*Remand Order*). Upon remand, the ALJ accepted an amended financial showing by Urban and granted summary decision in favor of Urban on the financial issue. FCC 83M-4630, released December 13, 1983 (ALJ). He then issued a *Supplemental Initial Decision* (*S.I.D.*) (FCC 84D-18, released March 23, 1984), wherein he granted Urban's application because of, in the main, its proposal of the fulltime integration of its sole proprietor. WSCT-TV, which had previously been the top-ranked applicant with 78.04% fulltime and 13.77% parttime quantitative integration credit, was dropped behind Urban (100% fulltime integration credit), notwithstanding that the ALJ had concluded that the troublesome Syncom agreement had no effect on WSCT-TV's integration credit. *S.I.D.*, para. 31. The order of ranking of the other applicants was not repeated in the *S.I.D.*, although WTI's integration proposal was reduced because the ALJ found that the integration pledge was not reliable. *Id.*, paras. 36-38.[4]

3. This proceeding is now before the Review Board on exceptions to the *I.D.* and *S.I.D.* filed by all of the remaining parties. We have reviewed both the *I.D.* and the *S.I.D.* in light of the exceptions and briefs, a second oral argument held on August 14, 1984, and our examination of the record. We adopt the ALJ's findings and conclusions, except as modified herein, and affirm his ultimate conclusion that the grant to Urban is consistent with the Commission's comparative selection policies and precedent.

Basic Qualifying Issues

4. *Basic Qualifications of Grant.* By *Memorandum Opinion and Order*, FCC 82M-1143, released April 9, 1982, the ALJ designated an issue against Grant based on various alleged reporting derelictions and a misleading representation involving Lawrence Brailsford, Vice President, director, and 25% principal of Grant. Specifically, the Grant applicant had: (1) failed to amend its application to reflect that, in July 1981, Brailsford had filed in federal court for personal bankruptcy as well as for the bankruptcy of a company he personally owned, therein beseeching the court that his liabilities critically exceeded his assets; (2) again failed to reveal these bankruptcies in November 1981 responses to interrogatories from opposing parties seeking any such pertinent information; and (3) submitted a pleading in November 1981 which included a Brailsford letter giving the misleading impression that he still had the $27,150 cash-on-hand he had represented to the Commission prior to the July 1981

[4] By motion of August 14, 1984, WTI requested dismissal of its application. Its exceptions will not be considered.

bankruptcies, such cash being earmarked for his Grant stock. *See* FCC 82M-1143, *supra*, para. 6.

5. At hearing, both Brailsford and Milton Grant, President, Chairman of the Board, and 50% stockholder of Grant, offered testimony on the issue. Brailsford claimed that he did not remember the Commission's basic reporting requirements from mid-1980 until mid-March 1982 when he was preparing for this hearing[5]; that he did not inform Milton Grant or Grant counsel of the bankruptcies because of other "pressing issues" (*I.D.*, para. 32, *quoting* Tr. 2649), although he does claim to have truthfully informed Theodore R. Hagans, another 25% Grant stockholder (*id.*); and that the misleading answers to the subject interrogatories were not discussed with him prior to the preparation of Grant's pleading responses (*id.*, para. 33). Brailsford also asserted that a 1981 letter regarding his assets was modified by him without explanation to include his wife's name (although she is not a Grant principal or lender) because he was financially incapable of meeting the stock subscription obligation by himself (*id.*, para. 34). Milton Grant testified that he was not informed of Brailsford's bankruptcy until March 1982 (*id.*, para. 36); he did, however, assert that he was informed by counsel when reviewing the deficient answers to the interrogatories that Grant counsel had indeed reviewed the interrogatory responses with Brailsford (*see id.*, paras. 33, 36). Milton Grant also testified that he had advised Brailsford several times that significant changes in his status must be reported to the Commission (*id.*, para. 30).

6. The *I.D.* (para. 144) concluded that Brailsford's hearing testimony was so inconsistent as to be entitled to little or no credence, noting in particular the testimony as to the alleged date on which Brailsford claimed to tell both Grant and counsel about his bankruptcies. Brailsford first stated that it was March 1982; then he claimed November 1981; then later, March 1982 (*see id.*, paras. 35-36). Conversely, the ALJ observed that Milton Grant's testimony was perfectly consistent (*see id.*, para. 144). In addition to those Brailsford inconsistencies, the ALJ determined that Brailsford's fallacious testimony concerning the interrogatories, coupled with his misleading letter to the Commission implying that the assets to be used in paying for his Grant stock were the same as those he identified prior to his bankruptcy, conclusively demonstrated that Brailsford was intentionally less than candid with the Commission (*see id.*, paras. 145-146). Finding that Brailsford is a substantial Grant principal (25%), Vice President, director, and that individual proposed by Grant to represent the

[5] *I.D.*, para. 31. Section 1.65 of the Commission's Rules requires an applicant to amend its pending application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance. *See* 47 CFR §1.65.

station before the public,[6] the ALJ held that the applicant was not qualified to be a licensee (*see id.*, para. 148).

7. Grant does not except to the ALJ's finding of serious reporting violations or the finding of incriminating inconsistencies in Brailsford's testimony[7]; it concedes, *arguendo*, that a "substantial demerit" could be imposed.[8] Still, Grant nevertheless pleads that the ALJ erred in disqualifying it on the basis of Brailsford's misconduct and charges that the ALJ ignored exculpatory evidence which would support the lack of motive to deceive.[9] We disagree. The ALJ ignored nothing and carefully weighed all of the evidence, including Brailsford's testimony against that of Milton Grant, and he concluded that the record as a whole clearly demonstrated that Brailsford had deliberately withheld from the Commission facts material to Grant's application. Thus, for example, although Milton Grant testified that he was not informed of Brailsford's bankruptcy until March 1982, Brailsford — after first claiming that he had not told Grant — then testified in great length and detail as to how he *had* informed Grant of these matters in November 1981 (*see I.D.*, para. 144). But, Brailsford subsequently recanted that testimony.[10] Further, while Milton Grant averred that counsel advised that he had reviewed the interrogatory responses with Brailsford, Brailsford flatly denied this (*see I.D.*, para. 33). Similarly, Brailsford's unexplained insertion of his wife's name in the letter in which he blithely claimed that his current assets exceeded his liabilities by $15,000 plainly evinces a lack of candor as to his prior filing for bankruptcy. And, even were the several deceptions "unnecessary" (as argued by Grant), such an argument is unavailing. As the Supreme Court observed nearly forty years ago in *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946):

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body my be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.

8. Grant's second line of defense is that its disqualification appears at odds with a number of prior Commission cases.[11] Yet, it is firmly settled

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[6] Brailsford is still slated to be Grant's proposed station's Public Affairs Director. *I.D.*, para. 29.

[7] *See, e.g.*, Grant Exceptions at 7, 18-19. Grant also concedes that Brailsford's letter " ... left the [misleading] impression that the available assets were those he promised previously." *Id.*, at 24.

[8] *See id.*, at 19, 26.

[9] *See id.*, at 20-21.

[10] *See* Tr. 2681-2685. Mr. Brailsford's excuse for his richly detailed fabrication was that he'd had no sleep the night before and that he had previously missed an airplane to "the most important meeting of [his] life." Tr. 2720.

[11] *See* Grant Exceptions at 26-36.

that representations by a broadcast applicant calculated to mislead the Commission, including answering falsely to interrogatories, will form the basis for disqualification of that applicant. *See WNST Radio*, 70 FCC 2d 1036 (Rev. Bd. 1978); *cf. Palmetto Broadcasting Co.*, 33 FCC 250, 253 (1962), *recon. denied*, 34 FCC 2d 101 (1963), *aff'd sub nom. Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843. "It is ... fundamental to the regulatory process that the Commission be able to rely on the representations of those whom it licenses and those who come before it seeking licenses. Therefore, the Commission must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations." *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). The ALJ has made valid findings that Brailsford's conduct was intended to deceive the Commission, and those factual findings are entitled to our deference unless the record supports a contrary result. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 840 (Rev. Bd. 1981). The cases cited by Grant to support its backup defense are largely inapposite: these primarily involve reporting omissions or inaccurate statements where no intent to deceive the Commission was apparent. In those few cases where an intent to deceive was found, and lesser sanctions imposed, the record contained mitigative facts not present here. Conscious failure to inform the Commission about so significant a change in financial status as the bankruptcies present here is inexcusable. *See, e.g., WADECO* v. *FCC*, 628 F.2d 122 (D.C. Cir. 1980).

9. Grant lastly argues that the ALJ erred in weighing into his decision its failure to remove Brailsford from the corporate applicant.[12] However, both the Commission and the Review Board have previously taken into account a wrongdoer's prompt severance from an applicant as an element that may be considered in determining just and appropriate action. *See Central Texas Broadcasting Co.*, 74 FCC 2d 393, 409 (1979); *Nuance Corp.*, 85 FCC 2d 412, 417 (Rev. Bd. 1981). Although removal of an offending principal from a broadcast applicant will not entirely moot an inquiry into the facts surrounding the misconduct, *see TV 9, Inc.* v. *FCC*, 495 F.2d 929, 939 (D.C. Cir. 1973), it would serve little purpose, and certainly not the public interest, to discourage an applicant from swiftly removing an unworthy principal, and the ALJ did not err in considering Brailsford's continued presence as a Grant principal as a factor in his ultimate determination.[13] In that connection, Grant contends that Brailsford's role as a non-majority (25%) owner is too limited to compel the

[12] *See* Grant Exceptions at 39-42.

[13] Even had the ALJ not considered this secondary factor, Grant's disqualification was fully warranted. In fact, any "substantial demerit" — as suggested by Grant itself — would have doomed Grant's application on a comparative basis in any event. *See generally Peoples Broadcasting Corp.*, 92 FCC 2d 1305, 1319 (Rev. Bd. 1983).

corporate applicant to bear the full weight of his deceptive actions. It cites *Watkins Glen-Montour Falls Broadcasting Corp.*, 20 FCC 2d 295 (1969),[14] where the Commission affirmed an earlier grant of a short-term license, that restriction having been imposed because that licensee's non-majority stockholder had previously engaged in misconduct *while employed at another station. See* 20 FCC 2d at 295. The short-term license was there considered to be an adequate sanction because that licensee's station had been operating in full compliance with the rules, the wrongdoer's first-class radiotelephone operator license had been suspended for a 4-month period, and the licensee had assured the Commission that its minority stockholder would not be dominant in the management and operation of the station. *See id.* at 296. Here, by contrast, the misconduct related directly to the application under consideration and was committed while Brailsford was an applicant principal, not while he was employed elsewhere. As pointed out in *WOKO, supra*: " . . . as a matter of law, the fact that there are innocent stockholders cannot immunize the corporation from the consequences of such deception . . . . Consequences of such acts cannot be escaped by a corporation merely because not all of its stockholders participated." 329 U.S. at 227. We will affirm the ALJ's resolution of this issue.

10. *Basic Qualifications of Urban.* Before we move to the comparative qualifications of the respective applicants, we must also dispose of the key question of whether Urban is to be considered basically qualified to be a licensee or whether it has not properly demonstrated that it is financially able to build and operate its proposed station.[15] One of the bases for our *Remand Order* was our view that Urban was disqualified at the initial hearing with undue haste and, particularly under the spirit of *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), not afforded an adequate opportunity to prove the efficacy of its tendered financial plan. In *Anax*, the Commission reversed an ALJ's disqualification and dismissal of an applicant which had tendered an amendment to its financial proposal after the technical deadline had passed for such amendment. While not abandoning its traditional "good cause" requirement for untimely amendments which go to basic qualifying issues,[16] the *Anax* Commission stated

[14] *See* Grant Exceptions at 43.

[15] *See* 47 U.S.C. §308(b) (FCC may prescribe as to financial qualifications). Pursuant to a change in Commission policy, more recent applicants need only "certify" as to their financial capability. *See Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 382 (1981). However, that 1981 policy change did not apply to earlier-filing applicants such as those at bar. *See Gaco Communications Corp.*, 94 FCC 2d 761, 775-777 (Rev. Bd. 1983), *aff'd*, FCC 84-212, released May 14, 1984 (Comm'n).

[16] *See* 47 CFR §73.3522(b). The Commission has adopted a six-point "good cause" test:

(1) the amendment was prepared with due diligence; (2) was not required by the

that it has "not required a showing that an amendment is occasioned by an involuntary or unforeseen act in cases where the amendment tends to remove a disqualifying defect and confers no comparative advantage." 87 FCC 2d at 488-489 (footnote omitted). Moreover, the Commission has "held that the due diligence requirement should be interpreted in light of the equities of the case, especially where a proffered amendment is intended to cure a disqualifying defect." *Id.*, at 489 (footnote omitted).[17]

11. Without repeating the reasoning of our *Remand Order*, we returned Urban's application to the ALJ so that it might demonstrate by sufficient evidence the reliability of its proposed financing from two purported lending sources, AMVEST Leasing and Capital Corp. and the National Bank of Commerce (Washington, D.C.). *See* 94 FCC 2d at 1362-1364. Pursuant thereto, the ALJ reopened the hearing on the following issues involving Urban:

> 1. (a) Whether AMVEST Leasing and Capital Corporation qualifies as a financial institution or a financially qualified lessor and, if so, whether the leasing commitment letter is satisfactory under the standards of the June 1977 version of FCC Form 301.
>
> (b) Whether the loan commitment letter supplied to Urban by the National Bank of Commerce is in accord with Commission requirements.

S.I.D. at para. 2 (reprinting issues designated in *Memorandum Opinion and Order*, released October 6, 1983 (ALJ)).

12. As related by the parties and reflected in the record, the following chronology ensued: Urban agreed to the nature and scope of the above issues, indicated that it stood ready to support its AMVEST/National Bank of Commerce financing proposal, and advised the ALJ that it was preparing a motion for summary decision on the above issues.[18] But, by order of November 7, 1983,[19] the ALJ ruled that he would not consider summary decision on the designated Urban financial proposal since the Board had remanded that proposal specifically for evidentiary hearing.[20] Then came the rub. While shunning summary decision on the AMVEST/

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voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage.

Erwin O'Conner Broadcasting Co., 22 FCC 2d 140 (Rev. Bd. 1970).

[17] The Board applied the *Anax* principles at a later stage of that same case. *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982).

[18] *See* WSCT-TV Exceptions to *S.I.D.* at 7-9.

[19] *Memorandum Opinion and Order*, FCC 83M-4051, released November 7, 1983 (ALJ). By subsequent *Order*, the ALJ formally dismissed Urban's motion for summary judgment. FCC 83M-4185, released November 14, 1983 (ALJ).

[20] *See id.*

National Bank of Commerce proposal, the ALJ opined[21]:

> . . . [t]his does not mean, however, that a motion for summary decision would not be considered if Urban relied on financing from new sources or under different conditions from its current sources.

Although at least one of the parties had initiated discovery efforts under the designated financial issue,[22] Urban promptly took up the ALJ's open invitation to submit an alternative financing plan and, on November 23, 1983, sought to amend its application to rely, in the alternative, on deferred equipment credit from RCA and a $1.5 million bank loan from Mercantile-Safe Deposit & Trust Co. (Baltimore, Md.)[23]; it concurrently sought summary decision on the financial issue.[24] By orders of December 6 and 13, 1983, the ALJ, respectively, accepted Urban's amendment[25] and granted summary decision on the RCA/Mercantile proposal,[26] thus finding Urban financially qualified.

13. In their exceptions to the *S.I.D.*, Urban's competitors complain bitterly that it was error for the ALJ to have accepted Urban's amended financial proposal when the Board specifically remanded the proceeding to allow Urban to prove out its hastily dismissed AMVEST/National Bank of Commerce proposal. Citing *Erwin O'Conner*, *supra* note 16, the parties contend that Urban failed to meet the "good cause" test embodied in 47 CFR §73.3522(b) governing post-hearing designation amendments and that neither *Anax* nor *Bison City*, *supra* note 17, permit a financial amendment at this late stage in the proceeding. It is even argued, in essence, that the ALJ's acceptance of Urban's amendment was *ultra vires* in that he modified (without authority) the financial issue "designated" by the Board in its *Remand Order*.[27]

14. The ALJ's invitation to and acceptance of Urban's amendment presents us with a serious and unprecedented dilemma.[28] It is true, as

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[21] FCC 83M-4051, *supra*, at n.1. The ALJ repeated the invitation to Urban to rely on new financial sources in his November 14, 1983 dismissal order. *See* Capital Exceptions to *S.I.D.* at 6.

[22] *See, e.g.*, WSCT-TV Exceptions to *S.I.D.* at 8-16.

[23] Urban Exceptions to *S.I.D.* at 8.

[24] *See id.*

[25] *Memorandum Opinion and Order*, FCC 83M-4507, released December 6, 1983 (ALJ). However, the ALJ correctly refused to consider Urban's proposals in the alternative and compelled Urban to elect one proposal.

[26] *Memorandum Opinion and Order*, FCC 83M-4630, released December 13, 1983 (ALJ).

[27] *See, e.g.*, WSCT-TV Exceptions to *S.I.D.* at 32-36. We reject this exception: an ALJ has broad authority to conduct a hearing proceeding, *see, e.g.*, 47 CFR §1.243, and nothing in our *Remand Order* was meant to circumscribe the ALJ's ordinary authority. Whether the ALJ erred in the exercise of that authority is another matter.

[28] Or, as WSCT-TV aptly comments:

> Following its consideration of the briefs and arguments, the Board saw fit to remand the proceeding to the Presiding Judge. *Memorandum Opinion and*

Urban's antagonists assert, that our remand was intended to permit Urban a fair opportunity to demonstrate that its AMVEST/National Bank of Commerce proposal would, in fact, hold water, an opportunity we felt Urban was too curtly denied at the original hearing stage. Moreover, we agree that neither *Anax* nor *Bison City* is factually similar to the circumstances here where, nearly two years after this case was originally designated for consolidated comparative hearing,[29] a party submits an entirely new financial proposal without the careful invocation of the "good cause" test for amending applications — a test codified in our rules and carrying the force of law. While cases such as *Anax* and *Bison City* have defined the "good cause" test in a manner that is less rigorous when it comes to amendments directed to basic qualifications, neither case law nor Commission policy have reached the point where such amendments may be received at any time or stage in the proceeding "as a matter of right." *See California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982). Although recognizing that the Commission is more liberal in accepting amendments going to basic qualification issues than in accepting those affecting the applicant's "comparative" position,[30] the Board has rejected an applicant's amended financial proposal tendered on the first day of hearing and eight months after the applicant conceded that it was not financially qualified. *Coastal Bend Family TV, Inc.*, 94 FCC 2d 649, 652-657 (Rev. Bd. 1983) (application for review pending). In a similar vein, we refused to accept a transmitter site amendment (a matter going to basic technical qualifications) where even the relaxed "good cause" test applicable to basic qualifications was not met. *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *aff'd*, FCC 84-119, released April 2, 1984 (Comm'n). *See also Colorado Television, Inc.*, FCC 84R-53, released August 3, 1984 (Rev. Bd.) (application for review pending).

Order, FCC 83R-62, released August 31, 1983 ('Remand Order'). In so doing, the Board sought to utilize the adversarial process to elicit 'more definitive evidence' on specific issues crucial to its ultimate decision. *Id.* While it took this approach 'to be safe [rather] than sorry,' it has not achieved such a result. *Ibid.* Rather than resolving unanswered questions, the Presiding Judge has now presented the Board with new, and more serious, legal and factual issues to consider.

WSCT-TV Exceptions to *S.I.D.* at 2.

[29] *See* 46 Fed. Reg. 43737 (August 31, 1981) (*reprinting Hearing Designation Order*, released August 19, 1981).

[30] The Board is very strict in rejecting amendments to an application which might "upgrade" an applicant's comparative standing *vis-a-vis* its competitors after the deadline for such improvements has passed. Our reasons for our rather rigid application of the six-point "good cause" test where amendments affect "comparative" qualifications were set forth at length in the recent *Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1329-1330 (Rev. Bd. 1984) (applications for review pending).

15. On the face of it, and absent exigencies beyond the control of the applicant which might have furnished "good cause,"[31] we believe that the ALJ should not have permitted so late an amendment which negated Urban's AMVEST/National Bank of Commerce proposal — a proposal it always insisted *and continues to insist* is efficacious.[32] Whatever our own predilections, the practical result is that the Board is now offered one of three possible courses of action: (1) find Urban "to be financially disqualified on the basis of its failure to demonstrate the adequacy of its financial qualifications"[33]; (2) remand "for a second time to once again consider Urban's financial qualifications"[34]; or, (3) affirm the ALJ's summary decision that "the RCA commitment complies in all respects with Commission requirements and the Mercantile commitment offers reasonable assurance that a loan will be made should Urban receive a grant."[35] Not to put too fine a point on it, all three alternatives are clearly "imperfect."

16. When confronted with novel or especially troublesome issues, it is no act of neophobia to seek refuge in "First Principles," and our reference to the fundamental goals of the comparative licensing process and to the basic legal regimen bordering that goal induce us to regard Urban as financially qualified and move the comparative process forward, even if, *arguendo*, the ALJ erred in the unique situation here presented.[36] Initially, the Commission's paramount concern is that a chosen applicant have the financial backing to actually construct and operate a broadcast facility, lest the entire selection process become moot.[37] Hence, adequate

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[31] *But see Anax, supra*, reiterating that an amendment going to basic qualifications need not be "occasioned by an involuntary or unforeseen act. . . ." 87 FCC 2d at 488-489.

[32] Not only did Urban proffer its AMVEST/National Bank of Commerce plan as "an alternate plan of financing" in December 1983 and claim that it "did not switch or abandon its NBC/AMVEST plan," it submits that it "elected to rely upon the Mercantile/RCA plan solely because the Presiding Judge required Urban to choose which plan it would pursue." Urban Reply to *S.I.D.* Exceptions at 10. Whereas the ALJ specifically held that he would not grant summary decision on the first plan, he stated that he would — and did — on the second. Under those circumstances, Urban's election was natural, and we find no misrepresentation of its intentions as asserted by WSCT-TV (Exceptions to *S.I.D.* at 21-25).

[33] *See* Capital Exceptions to *S.I.D.* at 10.

[34] *See* WSCT-TV Exceptions to *S.I.D.* at 3-4.

[35] *See* Urban Reply to *S.I.D.* Exceptions at 9.

[36] We do not concur with the ALJ's casual observation that "timeliness and an orderly process are minor considerations when financial qualifications are at issue." FCC 83M-4507, *supra*, at para. 9. These are matters affecting the public interest as well as those of the parties. *Cf. Valley Telecasting Co., Inc.* v. *FCC*, 336 F.2d 914, 917 (D.C. Cir. 1974).

[37] Many awarded UHF television construction permits have had those permits rescinded for failure to construct. *See, e.g.*, FCC Report No. 19280, released September 14, 1984 (1981 construction permits of two Oklahoma TV stations rescinded for failure to construct). Indeed, as touched upon in note 1, *supra*, this very Channel 14 (formerly

financing is a basic qualifying issue, *see* 47 U.S.C. §308(b); *Gaco Communications Corp., supra* note 15, a *public interest* matter directly between the Commission and each individual applicant. Coupled logically to the proposition that basic qualifications are primarily a public interest matter between the FCC and the applicant is the well-established doctrine set forth in *Azalea Corp.*, 31 FCC 2d 561, 563 (1971):

> No applicant has a vested interest in the disqualification of a competing applicant. Since the public interest is best served by having as many qualified applicants as possible competing for each broadcast facility, it has long been Commission policy to permit an applicant to remove a disqualifying factor through amendment during hearing.

Thus, while competing parties can and do take active part in litigation over basic qualifying issues, those applicants — *as a matter of law* — have no vested right to bar an application amendment which would remove a basic disqualifying hurdle from a competitor's path; that is a procedural prerogative of the Commission. As the Board has stated, "when the Commission applies its procedural rules strictly it must remain mindful of the underlying purposes of those rules to ensure that rigidity does not override those purposes, justice, or equity." *Son Broadcasting, Inc.*, 92 FCC 2d 450, 452 (Rev. Bd. 1982). *See also Anax, supra.* It is generally sufficient under Commission policy that competing applicants are protected against post-hearing designation amendments which would "upgrade" a competitor on any of the *comparative* elements set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*e.g.*, diversification of media control, ownership integration with management, comparative coverage, *etc.*). *See Daytona Broadcasting, supra* note 30.[38] That is not to say (we repeat), that an applicant may amend *ad infinitum* to remove a basic disqualifying issue: "good cause" — albeit under a relaxed test, *see Anax* — must still be shown. And we will not permit late amendments where the potential disruption to the process severely impacts on the public's interest in the initiation of a new broadcast service. *See, e.g., Shoblom Broadcasting, supra.* But, as the Commission stressed in *Anax*, the acceptance of amendments removing a basic disqualifying issue against an applicant depends on the surrounding equities, at least insofar as measuring "due diligence" in the filing of the

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WFAN-TV) is currently available because its prior licensee asserted a lack of financial resources necessary to sustain operating losses or to activate the channel, and the Commission revoked the license. *United Television Co., Inc., supra.* As a consequence, Washington, D.C. has been without a functioning Channel 14 for more than a decade.

[38] As a legal matter, therefore, the ALJ's acceptance of the Urban amendment caused no cognizable "prejudice" to the other applicants within the meaning of the *Erwin O'Conner* "good cause" test, *supra* note 16. At oral argument none of Urban's opposing counsel disputed this article of "black letter law." *See, e.g.*, Tr. of Oral Arg. (August 14, 1984) at 3395, 3404.

amendment. That brings us to a third reason for reluctantly accepting Urban's amendment, for if its opportunity for enqualification was perceived as abridged when it was quickly disqualified at the initial hearing, nothing could be more inequitable than disallowing its amended financial proposal which was filed almost immediately after the *express invitation* of the ALJ, the Commission official charged with presiding over these matters.

17. In the end, and whether or not the ALJ erred in inviting and accepting Urban's new financial proposal rather than simply affording it a fair chance to support the one he had so briskly dismissed at the initial hearing, we believe that the better course under the unique situation here would be to accept Urban's amendment, regard it as financially qualified,[39] and proceed with our comparative contest. Apart from Urban's equities in seeking to become qualified, we believe that this course will be far less disruptive than a remand (superfluous at this point),[40] does not legally prejudice the other parties,[41] results in no comparative "upgrading," and preserves the largest comparative choice for the Commission.[42] While we appreciate the disgruntlement of the other parties at this unorthodox turn of events (and, no doubt, their inevitable disenchantment with the Board over our instant ruling),[43] the public interest in launching a new television channel in Washington, D.C. must no longer remain hostage to this travail over procedural punctilio.

Section 307(b)

18. Whereas all of the other competing applicants have specified Washington, D.C. as their prospective community of license, Urban has specified the nearby city of Arlington, Virginia, and seeks a preference

[39] While the other parties opposed the ALJ's grant of summary decision on the amended Urban plan, we affirm his grant and find that their objections to the amended financial proposal raise no significant and material issues of fact. The commitments of Urban's backers are as firm as most we have seen and provide reasonable assurance of financing. Furthermore, although several parties claim that they were denied due process because they were not accorded discovery on the amended plan, they were not entitled to discovery in the absence of triable factual issues designated for hearing. 47 CFR §1.311(b). Urban's amended plan raised no factual questions requiring evidentiary hearing, and summary judgment was proper.

[40] Avoiding disruption to a proceeding is a concern even under "good cause" test. *See supra* note 16.

[41] *See Azalea Corp., supra.*

[42] *See id.*

[43] We do note, however, that Urban's competitors are in a position no worse than if Urban had been found financially qualified at the earliest phase of this hearing, even if that had required a timely amendment. *See Bison City, supra.*

under 47 U.S.C. §307(b) for its proposal. *See I.D.*, para. 21.[44] But, the ALJ found that Urban's exhibit (Urban Exh. 4) purporting to set forth Arlington's Section 307(b) merits and its need for its own television station was rejected, and a substitute exhibit in support thereof never proffered. *I.D.*, para. 21. Urban excepts to the ALJ's rejection of its exhibit and his denial of a Section 307(b) preference.[45]

19. We need not rule on the ALJ's rejection of Urban's exhibit, for even assuming the accuracy of all of the facts set forth therein, no decisional Section 307(b) preference would accrue to Urban. When we accept the fact that the Arlington community is politically separate from Washington, D.C., it is entitled to no preference for the reasons most eloquently reiterated in Urban's own exceptions[46]:

> ... (1) Urban proposes to serve essentially the same area and population as the Washington applicants from a transmitter site located in Washington; (2) Urban perceived the whole Washington area as constituting the audience support for the station; (3) Arlington is a contiguous suburb representing only a part of the Washington 'community'; (4) Urban would use Section 307(b) as a procedural device to gain a preference and then would use Channel 14 to provide service to the same 'community' as the other applicants; and (5) Urban has no ties to Arlington — its only stockholder lives in Washington and its financial proposal is premised on service to the Washington television market.

We recently considered a very similar situation in *Cleveland Television Corp.*, 91 FCC 2d 1129, 1136-1137 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).[47] Distinguishing the situation with respect to radio stations, the Board there thoroughly traced Commission precedent and, in short, found that:

> Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of

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[44] Urban claims:

> The record reflects the following evidence concerning Arlington, Virginia, and its need for a first local television service: Arlington is the fourth largest community in Virginia. No television stations are licensed to it. Urban would provide Arlington with its first local television service. While its transmitter would be located in Washington at a site (Massachusetts and Nebraska Avenues, N.W.) immediately contiguous to Arlington, Urban would provide principal city coverage to Arlington and would locate its studio there.

Urban Exceptions at 18 (citations to record omitted).

[45] Urban Exceptions at 17-20, 34-38.

[46] Urban Exceptions at 18. Indeed, we need not rule on its Section 307(b) exceptions at all for our purposes because Urban — recognizing *Cleveland Television, infra* — has made these exceptions contingent on its loss under the standard comparative issue. *See* Urban Exceptions at 37-38. For the sake of completeness, we nonetheless discuss the issue.

[47] The Section 307(b) issue was not before the court.

artificial political boundaries.' *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n.4, 20 RR 2d 1311, 1321 n.3a (1971), *aff'd sub nom. Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972). Therefore, television stations — unlike FM broadcast stations — are generally considered as providing 'an areawide, rather than a localized service.' *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369. 91 FCC 2d at 1137.[48] Although finding there that the city of "Shaker Heights, Ohio and Cleveland are politically independent municipalities," *id.*, at 1135, no Section 307(b) preference was awarded the Shaker Heights applicant, notwithstanding that Cleveland already had five licensed television stations. Arlington, Virginia — while separated from Washington, D.C. by the liquid width of the Potomac River — enjoys much the same relationship to Washington, D.C. as Shaker Heights does to Cleveland; it is a fractionally smaller contiguous municipality (1980 pop., 152,599) and very much an integral part of the greater Washington, D.C. television market, a fact tacitly conceded by Urban in the portion of its exceptions reprinted above. It is no more entitled to a decisional Section 307(b) preference over Washington, D.C. for a full service commercial television station than, perhaps, Reston, Virginia or Takoma Park, Maryland. As fully apprehended by Urban, *Cleveland Television* is controlling.[49]

Integration of Ownership in Station Management

20. *Urban.* Urban has always proposed the fulltime integration of its sole owner, Theodore White; thus its quantitative integration factor is 100%. *See S.I.D.*, paras. 42, 44. Urban is entitled to qualitative enhancement of its integration credit since White is a long-time resident of the service area and belongs to an FCC-favored racial minority group. *Id.*, paras. 44, 47. Though Urban's opponents attack its basic financial qualifications (*see supra* paras. 10-17), none directly challenges its quantitative or qualitative integration advantage. Ergo, Urban is the front-runner under the Commission's ownership integration criterion, possessing a lead — *ceteris paribus* — well-neigh insurmountable. *See, e.g., West Michigan Broadcasting Co.* v. *FCC*, No. 82-2513 (D.C. Cir. May 25, 1984).

21. *WSCT-TV.* Because WSCT-TV's facially impressive integration proposal was obscured by a financial agreement with a potential lender which appeared to give that lender, Syncom Corporation, the right to receive warrants convertible into the common stock of WSCT-TV's parent, Formula Telecommunications, Inc., *see I.D.*, paras. 122-128, our *Remand Order* directed the ALJ to re-examine that agreement and to determine whether the Syncom/Formula agreement should have the effect of diluting the integration credit awarded to WSCT-TV. *See Remand Order*, 94 FCC 2d at 1364 & n.7, (finding that WSCT-TV would otherwise be due a

[48] *Cf. New Jersey Coalition For Fair Broadcasting* v. *FCC*, 574 F.2d 1119, 1125 (3rd Cir. 1978) ("section 307(b) permits the Commission to rely on out-of-state stations to meet an area's service requirements . . . . Congress did not intend that each state have a right to a local station").

[49] *See* Urban Exceptions at 37 n.20 (conceding that its case on this issue is not "in harmony" with *Cleveland Television).*

78.04% fulltime credit).[50] The ALJ revisited this matter at the supplementary hearing and again concluded that the Syncom agreement should have no impact on WSCT- TV's integration credit. *See S.I.D.*, at 25-31. Because WSCT-TV could be a relatively strong competitor under the ownership integration criterion (second only to Urban's 100%), and in light of the questions that might be raised before the Commission as to Urban's enqualification, we will very carefully review the exceptions to the *S.I.D.* on this matter.

22. By way of background, and without reiterating the entirety of the concerns expressed in our *Remand Order*, we found that the Syncom/ Formula agreement appeared — in certain pertinent words of the agreement — "to provide Syncom with a right to purchase warrants and to participate in the financing of Formula's station" (up to $500,000 in loans) in partial consideration of a $10,000 loan already extended.[51] Those warrants, apparently available to Syncom at the nominal price of ten cents a share, would have given Syncom from 10% to 26% of Formula's (hence WSCT-TV's) active ownership at a maximum cost to Syncom of $200.[52] WSCT-TV's opponents argued, therefore, that WSCT-TV's integration factor — based, of course, on the proportionate ownership percentage of the current principals — should be reduced since the integrated principals might soon own a greatly diminished share of the overall control of WSCT-TV.[53] In view of the significant questions unanswered as to the Syncom/Formula agreement, we remanded "to revisit the vital question of Syncom's current legal rights (based upon appropriate principles of contract law); and, if necessary to address the consequent question of whether [WSCT-TV's] ownership integration plan" is fully creditable.[54]

23. The ALJ took evidence on the issue, considered the arguments of the parties, and in summary found that Syncom and Formula did seriously

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[50] WSCT-TV was also awarded parttime credit of approximately 13%, *see I.D.*, para. 160, as well as qualitative enhancement of its credit because "minorities and women hold an 78.04% interest in WSCT-TV." *Id.* However:

> ... it is well established that qualitative attributes, such as minority ownership, may enhance the value of an integration proposal but cannot overcome clear quantitative differences. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 428-29 (1981); *Van Buren Community Service Broadcasting, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981).

Horne Industries, Inc., FCC 84-286, released July 20, 1984 (Comm'n) at n.12.

[51] *See* 94 FCC 2d at 1364.

[52] *See id.*, at 1365. Syncom's maximum ownership of Formula apparently depended on Formula's success in raising capital from sources other than the potential Syncom loan (*see id.*).

[53] *See, e.g.*, Century Exceptions at 40-45; WCTO Exceptions at 29-30; Grant Exceptions at 44-45.

[54] 94 FCC 2d at 1366.

negotiate a potential loan from Syncom for several months in 1980, culminating in the January 1981 agreement under question. *S.I.D.*, paras. 5-9. He then considered the testimony of George C. Corbin III, president of Formula, and of Herbert P. Wilkins, president of Syncom. Wilkins' testimony was inconsistent: while he first asserted that the agreement was "conditioned on Formula's coming to Syncom to actually take down the proposed financing"[55] and that "Syncom had no right to require Formula to accept financing from it under the terms of the December 17, 1980 letter,"[56] Wilkins later asserted that, even if the foregoing interpretation was wrong, the agreement gave Syncom no more than a "right of first refusal" to match any other lender's offer.[57] Corbin generally concurred with Wilkins' permissive view of the agreement and asserted that Formula had no intention of borrowing money from Syncom.[58] The ALJ concluded "that the possibility of Syncom exercising an ownership interest through conversion of warrants for Formula common stock does not in reality exist."[59]

24. In essence, WSCT-TV's opponents urge that "[t]he Presiding Judge's conclusion that Syncom does not have a right to participate in financing WSCT-TV's proposed facility, and the correlative right to warrants, was based entirely on the testimony of Corbin and Wilkins with no reliance on the principles of contract law, contrary to the directive of the Review Board in its *Remand Order*."[60] They argue that where an agreement is "clear on its face," parol evidence is not admissible to illuminate the intentions of the contracting parties.[61]

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[55] *S.I.D.* at para. 11 (*quoting* WSCT-TV Exh. 30 at 5).

[56] *Id.*, at para. 13 (*quoting* WSCT-TV Exh. 30 at 8-9).

[57] *Id.*, para. 12.

[58] *Id.*, para. 15.

[59] *Id.*, at para. 30.

[60] WCTO Exceptions to *S.I.D.* at 18. *See also* Century Exceptions to *S.I.D.* at 3-7; Capital Exceptions at 10-18.

[61] *See, e.g.*, Capital Exceptions to *S.I.D.* at 11-12. However, the parties equivocate on whether the agreement, taken in its entirety, is "clear on its face." *See, e.g., id.*, at 14; Tr. of Oral Argument at 3386. To be more precise, they argue that while a December 1980 letter outlining the proposed agreement might be "ambiguous," the January 1981 document is clear. But, the 1981 document expressly incorporates by reference the "ambiguous" December 1980 letter. *See Remand Order*, 94 FCC 2d at 1364 (*quoting* WCTO Exh. 1). Furthermore, as Professor Corbin has observed:

> *Parol Evidence Admissible for Purposes of Interpretation.* No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined. The 'parol evidence rule' is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted and all those factors that are of assistance in this process may be proved by oral testimony.

25. As we noted in *B&M Communications, Inc.*, 95 FCC 2d 224, 226 (Rev. Bd. 1983), the eminent Professor Corbin iterates that the fundamental goal of contract construction is the intent of parties. *See also WILLISTON ON CONTRACTS*, THIRD EDITION §601. Although we recognize that the parol evidence rule is a substantive rule of law which, in a nutshell, holds that "extrinsic evidence to vary the terms of the written instrument is excluded," *id.*, §631 at 961, a usual prerequisite to the strict application of the rule is that the terms of an agreement are "clear and explicit." *See id.*, at 964; *see also supra* note 61. In addition, the parol evidence rule applies only to the parties to a contract and does not run to third persons, unless, for example, such persons are privies or third party beneficiaries. *See* WILLISTON §647.[62] And, the cases cited by WSCT-TV's opponents in seeking to strictly apply the parol evidence rule involve conflicts between the contracting parties, a situation not present in our case.[63]

26. In light thereof, and because the parties' own interpretation of a contract is customarily favored, *see* WILLISTON §623, it was not error for the ALJ to permit parol evidence to help adduce the definitive meaning of the compound Syncom/Formula agreement. Nonetheless, and in the main, we would give little if any weight to most of the latest testimony of Corbin and Wilkins, such testimony being at such wide variance from the documentary evidence.[64] On the other hand, it is not disputed that the Syncom/Formula agreement contained several express preconditions, one of which was that Formula would acquire and hold a subscription television franchise (STV) from American Television and Communications.[65] While WSCT-TV's opponents contend that inasmuch as the STV

> It is true that the language of some agreements has been believed to be so plain and clear that the court needs no assistance in interpretation. Even in these cases, however, the courts seem to have had the aid of parol evidence of surrounding circumstances. The meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party. Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence.
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> Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 622 (1944). *See also* 5 U.S.C. §556(d) ("[a]ny oral or documentary evidence may be received"); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 353 (1976), *cert. denied*, 429 U.S. 1092 (1977).

[62] We acknowledge that Professor Williston observed that the "third party" principle may be overstated; but the exceptions to the general rule are inapposite here.

[63] *See, e.g.*, Capital Exceptions to *S.I.D.* at 12; WCTO Exceptions to *S.I.D.* at 22-23.

[64] *See S.I.D.* at paras. 10-15. Consequently, WSCT-TV's opponents are correct when they note that, whereas Syncom's Wilkins inferred, at most, a "right of first refusal" on the Formula loan, nothing in the written documents so much as hints at such an intention.

[65] WSCT Exh. 30 at 8; *S.I.D.* at para. 12 n.2.

condition runs to Syncom's favor, it might waive the condition,[66] Wilkins specifically pointed to the recission of the STV franchise, *S.I.D.*, para. 12, and indicated that Syncom would not be obligated in the absence thereof.[67] Consequently, should Syncom ever attempt to enforce a contract interpretation different from that espoused here by Wilkins, it might very well be estopped. *See* WILLISTON §140 at 614. In view of all of the foregoing, we find that Syncom's potential interest in Formula is at this point so speculative (not to say unlikely) as to have no immediate or reasonably foreseeable impact on WSCT-TV's instant integration proposal.[68] Finally, we affirm the ALJ's determination that no operative voting trust ever existed that would alter WSCT-TV's ownership or control structure. *I.D.*, para. 163. The exceptors to that conclusion have shown no more than that observed by the ALJ in his consideration of the matter, and mere discussion or speculation cannot manufacture a legal voting trust. As a result of our examination, WSCT-TV is entitled to the quantitative credit it seeks.

27. *Century.* The ALJ did not cede to Century all of the integration credit it sought, the most significant diminution being his rejection of "substantial" credit (30 hours per week management participation) for Peter Yeskel, a 13.35% stockholder. *I.D.*, para. 175. Century excepts to this action, claiming that "the record is clear that Mr. Yeskel intends to routinely devote 30 hours per week to Century's station pursuant to a fixed schedule, and his proposal should have been credited."[69] Century also complains that the *I.D.* "flippantly belittles the duties [its parttime] stockholders will perform while making no explicit finding that such duties are non-managerial."[70] Conversely, others complain that the ALJ was overly generous in considering many of Century's principals to be managers.[71]

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[66] *See* WILLISTON §678.

[67] *See* WSCT Exh. 30 at 8-9.

[68] As a last note on this point, we acknowledge WSCT-TV's observation that the Commission's very recent *Report and Order in Docket Nos. 20521, et al.*, 55 RR 2d 1465 (1984), holds that various convertible interests such as non-voting stock, warrants, or debentures are not cognizable as ownership interests "[i]f the contingency upon which the conversion right rests is beyond the control" of the holder. *See id.*, at 1484. The Syncom/Formula "put/call" feature might have affected such control. *See* WSCT-TV Reply to Exceptions at 4.

[69] Century Exceptions at 27. In fact, Yeskel did pledge that, absent "extraordinary circumstances," he would be present at the station. *See id.*, at 26 (and transcript references therein). Having provided "reasonable assurance" of his participation, Yeskel's credit will be considered to be restored.

[70] *Id.*, at 27.

[71] *See, e.g.*, WSCT-TV Exceptions at 25-27 (contending that Century should receive only 18.27% integration credit).

28. We have closely reviewed the record and, except for Yeskel's pledge, find that the ALJ's characterization of the functions of many of Century's principals is largely accurate. We need not here belabor our view of the upper limit on how many of a single applicant's principals can be considered legitimate "managing owners" within the intent of the Commission's 1965 comparative *Policy Statement, supra,* nor need we rule definitively on whether each of Century's eleven (of seventeen) principals slated for management integration is entitled to the full credit sought. The Commission looks primarily to *fulltime* managing owners, after which the credit "drops off sharply." *Policy Statement, supra,* 1 FCC 2d at 395. At best, Century seeks 28.73% fulltime credit,[72] and that would take it far out of contention under the ownership integration criterion as against the current field.

29. *Capital.* Capital was awarded all of the full and parttime integration credit it sought, *I.D.*, para. 173, which adds up to 33.33% fulltime credit and 55.55% parttime credit, each of its stockholders being entitled to an 11.11% interest prior to the deadline against comparative "upgrading." *See I.D.*, paras. 91-100. Not satisfied, Capital "submits ... that there are special circumstances present here that require that *all* of CapCom's [Capital's] stockholders be regarded as full-time station employees."[73] It is obvious that all of Capital's arguments as to the experience of its principals hopelessly confuse *quantitative* integration credit with the *qualitative* enhancement thereof specially awarded for

[72] Century Exceptions at 24.

[73] Capital Exceptions at 11 (emphasis added). We assume no Freudian slip, and will construe Capital's reference to "employees" to mean *bona fide* managing principals. *Noblesse oblige.* In more detail, Capital urges:

> Under ordinary circumstances, it is reasonable to apply the *Policy Statement* mechanically and to give part-time integration much less significance than full-time integration. But CapCom's proposal is not ordinary. CapCom's stockholders have extraordinary knowledge of community needs and problems, and CapCom's commitment to integrate each stockholder into station operations, and to translate their knowledge into responsive programming, presents the Commission with an extraordinary opportunity. Under the special circumstances of this case, CapCom is entitled to a much greater preference than would ordinarily attach to 37.5% (or 33.3%) full-time integration and 62.5% (or 55.5%) part-time integration. Under the circumstances, CapCom is entitled to be evaluated as an applicant that proposes to make effective use of the special talents and backgrounds of *all* of its stockholders. Because of who its stockholders are, what they know about community needs and problems, what they have done in the past about those needs and problems, and what they are committed to do at the station, CapCom submits that its integration proposal is the equivalent of 100% integration of ownership and management, enhanced by local residence, meaningful participation in civic affairs, minority and female ownership, and some degree of broadcast experience.

Id., at 11-12 (footnote omitted).

qualities such as local residence and community service activities. *See Policy Statement, supra,* 1 FCC 2d at 396. None of the other parties felt compelled to give serious reply to Capital's creative blatherskite, and it is sufficient that we deny WSCT-TV's exceptions to the integration credit actually awarded in the *I.D.* to Capital,[74] leaving its credit exactly as concluded by the ALJ.

30. *WCTO.* WCTO is a nonstock corporation composed of ten directors, eight of whom it asserted would be fulltime managers. *I.D.*, para. 168. In general, the Commission equates directors of the board of nonstock companies with "principals" for purposes of computing integration credit, and it accords such credit in proportion to the number of integrated directors out of the total membership of the board. *See, e.g., Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725 (Rev. Bd. 1983), *aff'd,* FCC 83-441, released September 27, 1983 (Comm'n). The *I.D.* concludes, therefore, that "[i]f all of WCTO's integration is credited, it would have 80% fulltime integration," *I.D.*, para. 170, that 80% factor being enhanced by the presence of female and (racial) minority directors. *Id.*, para. 171. However, the ALJ reduced WCTO's numerical integration factor by some unspecified amount because of the minimal roles of two of the eight WCTO directors proposed for fulltime integration, Dr. and Mrs. Lucas H. Blevin. *Id.*, para. 170. More specifically, he found that although they offered that they would participate in managing and training "counselling" volunteers for a proposed call-in "Christian counselling" show, "there appears to be no policy function to their role and Dr. Blevin's testimony indicates that his daily time at the station will equal no more than two hours." *Id.*, at para. 170. Moreover, as to the Blevins, "their role is a shared function, essentially one job split in half . . . ." *Id.*

31. We easily affirm the ALJ's reduction in WCTO's integration claim so far as it goes, but — agreeing with certain of the exceptions — find that it did not go nearly far enough. For example, Dr. Blevins, an Arlington, Virginia dentist,[74a] "testified that he would be at the station at least from 8:00-10 p.m., five days a week," *I.D.*, at para. 58 (transcript citation omitted), expects to be paid for his role as a counsellor but hasn't discussed salary and does not know if the WCTO budget will provide for it, *id.*, and would gradually phase-out his dental practice which would "take six months to a year" once WCTO is on the air. *Id.* In order to receive credit for fulltime ownership integration, a principal must pledge to be present in a genuine managerial role at least 40 hours per week. *See Midwest Broadcasting Company, infra* note 75. Based on Dr. Blevins' own testimony, he is clearly not entitled to fulltime credit (40 hrs. per

[74] *See* WSCT-TV Exceptions at 27-30. Even if we accept most of the claims of WSCT-TV, Capital would be entitled to demur.

[74a] *I.D.*, para. 58.

week) as an integrated managing principal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981), *recon. denied*, 89 FCC 2d 631 (1982).[75] The same holds true for Mrs. Blevins. After finding that the "one job, split in half" by Dr. and Mrs. Blevins (*i.e.*, "assist[ing] each other in ... managing and training volunteers during an evening call-in program") has "no policy function" and that the Blevins "will not play an important role in the station's management," *I.D.*, at para. 170, the ALJ should have denied them management integration credit. *See New Continental, supra.*[76]

32. Also receiving unwarranted fulltime credit was WCTO's Dr. Wendell P. Whitten, an Alexandria, Virginia optometrist,[77] who proposes to continue practicing optometry should WCTO receive the construction permit, but says he will reduce his medical practice to 15 hours per week. *I.D.*, para. 53. However, according to Dr. Whitten's testimony, he now works fulltime at his medical practice and claims that his income gross is $65-75 thousand dollars. *Id.* In order to work the requisite 40 hours per week at the potential station, he claims that he will reduce his practice to 15 hours per week; but, he nonetheless expects to derive $50 thousand a year from practice. *Id.* Obviously, that — as they say — does not compute.[78] When faced with self-employed professionals who seek man-

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[75] Even parttime credit requires an unimpeded commitment of 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979), *aff'd mem.*, FCC 79-397, released June 21, 1979 (Comm'n). There we said (*id.*):

> Applicants have frequently attempted to establish that their principals, who may have other time-consuming business responsibilities, will work at the station during various scattered hours including evenings and weekends, in order to obtain integration credit over competing applicants. Opposing parties have attempted to disprove the feasibility of the part-time work proposals. The result is often a voluminous record of insubstantial minutiae. The expense for the applicants and the prolongation of the hearing process are simply not commensurate with the value of the evidence in choosing among applicants. Although we recognize that minor part-time participation at a station may in some instances have some value in station operations, we are of the view, in light of the considerations above, that it would be in the public interest to establish a cut-off point below which no credit will be given for part-time integration proposals. Twenty hours a week is an appropriate cut-off point for this purpose, since that quantity of time represents approximately one-half of a full-time work week.

[76] In that case we affirmed that, absent true management and policy functions, we would not award integration credit to principals for "normal broadcast employee-type activities ... ." 88 FCC 2d at 839.

[77] *I.D.*, para. 52.

[78] Counsel could not explain this conspicuous discrepancy at oral argument:

> BOARD QUESTION: How does that compute, counsel? He's working a full work week now, and I presume that he works very hard at his job and he earns 75 thousand dollars. He is only going to work 15 hours a week and expects to earn 50 thousand dollars.

agement integration credit, the Board has stated that "the very existence of their other interests renders questionable their commitments [to integration] in the absence of *an additional showing* by the applicant of the reliability of [an] integration proposal in order to support the preference sought." *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969) (emphasis added). And, in *Blancett* the principals — including medical professionals — sought only "to devote one quarter of their time to the operation of the station," *id.*, but the Board denied them integration credit. Needless to say, Dr. Whitten — who seeks *fulltime* credit — has provided less "reasonable assurance"[79] of integration pledge fulfillment than the modest *Blancett* principals. Dr. Whitten's ambitious expectations appear patently unrealistic. To say the very least, his fulltime integration credit is not supported by the record.

33. Of all of WCTO's integration proposals, the weakest (virtually to the point of frivolousness) is that of Ms. Joe-Ann Hayes, who is currently employed by the First American Bank (Columbia, Maryland branch).[80] Although she testified that "I know absolutely nothing about the news at the present time," *I.D.*, at para. 77 (*quoting* Tr. 381), and stated her belief that WCTO's location would be in Wheaton, Maryland (much closer to Columbia) until shown the WCTO application specifying Washington, D.C., *id.*, Ms. Hayes is proposed as the station's news director and the *sole* member on its news staff. *Id.*, para. 76. But, as the *I.D.* (para. 77; transcript citations omitted) reports:

> Ms. Hayes did not know if the WCTO budget had any allocation for news, or whether provision had been made for news programming equipment such as a camera and tape recorder. If equipment is available, she would operate them herself if she does not have a volunteer. She did not know who would be reading the news over the air or even if she would be doing that.

It is not claimed, of course, that Ms. Hayes is capable of unilaterally operating the complex equipment of a television newsroom, and it is not

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> WCTO COUNSEL: Well, perhaps he will raise his rates. I know that the record is not that clear on that, and it wasn't brought out on direct or cross-examination.
>
> Tr. of Oral Arg. at 2958-2959.

[79] That is the standard for crediting ownership integration proposals. *See New Continental, supra*, 88 FCC 2d at 838.

[80] Columbia, Maryland is approximately 30 miles from Washington, D.C. Ms. Hayes' bank job is described as:

> ... a management position in which she supervises two departments: Central Payments and the Central Vault. WCTO Exh. 6, at 1. In that capacity Ms. Hayes is responsible for processing all payments and deposits made by mail, including seeing that all cash orders and shipments are properly placed and accounted for.
>
> *I.D.*, at para. 78.

even explained who, for example, would operate the camera if Ms. Hayes *had* to read the news. Moreover, Ms. Hayes justified her fulltime integration credit by proposing to reduce her supervisory job at the bank to half-time (*i.e.*, less than 20 hours per week), *I.D.* para. 78, but nevertheless says that she expects to make the same salary at the bank. *Id.*[81] No evidence other than Ms. Hayes' oral expectations was presented in support of this unusual proposition. To be blunt, and taking this portion of the record as a whole, we find Ms. Hayes' purported integration plan to be inherently incredible, *cf. Gamble Skogmo, Inc.* v. *FTC*, 211 F.2d 106, 115 (8th Cir. 1954), and can certainly find no "reasonable assurance" that Ms. Hayes' integration proposal is either serious or realistically likely to be effectuated in the manner proposed. No fulltime management credit can be given.

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[81] At oral argument, WCTO counsel was not persuasive as to the Hayes matter:

BOARD QUESTION: I would like to move now to the first case — the fascinating case of Ms. Hayes. Ms. Hayes, as I understand it, is going to be the news director and the sole news — full time news staff person at the station, is that correct?

WCTO COUNSEL: Yes.

BOARD QUESTION: And apparently she works as a bank supervisor in Columbia, Maryland, is that correct?

WCTO COUNSEL: Yes.

BOARD QUESTION: And she testified that what she intends to do once the station is on the air is to work in the mornings at the bank, and take public transportation down to the station, and work full-time as the sole news director once the station is on the air, is that correct?

WCTO COUNSEL: Yes.

BOARD QUESTION: And she contended at this hearing that she expects to earn the same amount from the bank working half-time as she is now working full-time, is that correct?

WCTO COUNSEL: That is what the record says, yes.

BOARD QUESTION: I would like the name of that bank, because I would like to refer it to Mr. Volcker to put it on the "Watch List." Is there anything in the record, aside from Ms. Hayes' own self-serving testimony, that would support the fact that she is going to be paid exactly the same for working half-time as she is now full-time?

WCTO COUNSEL: No, there is nothing besides her testimony.

BOARD QUESTION: Is it also true that when questioned at the hearing with respect to her functions as the news director and asked what she knew about the news, she replied 'Absolutely nothing.' Is that correct?

WCTO COUNSEL: Yes, but I don't think that should be held against her. * * *

Tr. of Oral Arg. at 2959-2960 (corrected).

34. At most, then, WCTO is entitled to only 40% fulltime integration credit, even if we give it the benefit of the considerable doubt and accord parttime management credit for all four of the directors discussed in the preceding paragraphs. We do not know precisely what the ALJ intended when stating that the integration factor he awarded for the participation of Dr. and Mrs. Blevins was "reduced in importance" because their "one job split in half" had no managerial "policy function", *see I.D.*, para. 170, or why he fully credited the dubious proposals of Dr. Whitten and Ms. Hayes in the face of this record. His laxity here is in evident contrast to his comparatively stern rejection of the integration proposal of, for example, a 13.35% Century principal (*see supra*, para. 27). But, the opposing parties are correct in excepting to these actions, and we shall grant their prayers for relief to the extent indicated.

35. *Diversification of Control of the Media of Mass Communications.* The original *I.D.* concluded that none of the originally qualified applicants or their principals owned other media interests sufficient to warrant a comparative demerit. *See I.D.*, para. 153. The ALJ observed, however, that Theodore White, Urban's sole stockholder, is a 75% stockholder of Page Broadcasting, which — in turn — owns a 5% interest in a construction permit for a UHF television station in Nashville, Tennessee. *Id.*, para. 40. He opined that if Urban had been considered under the comparative issue, it "might ... receive a slight demerit for [its] media [holding]." *Id.*, at n.21. Subsequently, in the *S.I.D.*, the ALJ held that White's Nashville interest was too small to justify a demerit. *S.I.D.*, para. 41. Exceptions to the ALJ's original *I.D.* diversification findings were filed by Urban, WCTO, Century, and Capital. Urban had excepted to the potential demerit suggested by the original *I.D.*, contending that the Nashville interest did not warrant any demerit, but that, in any event, White's Nashville application vowed his divestiture of that interest should Urban's instant application be granted. *See* Tr. 2297. In exceptions to the *S.I.D.*, WCTO and WSCT would assess a comparative diversification demerit against Urban. We will not attribute the Nashville interest to Urban since White made a timely commitment to divest that interest should his application here be granted. *See Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1335 n.24 (Rev. Bd. 1984); *High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 635 (Rev. Bd. 1983).

36. WCTO also argues that the ALJ erred in not assessing WSCT-TV a very slight diversification demerit for the media interests of Lewis Rivlin, a 4.59% stockholder of WSCT-TV. Rivlin owns 25% of a company which — in turn — owns a 10% interest in three cable systems located 400 miles away from Washington, D.C. The ALJ recognized that in *New Continental Broadcasting Co., supra*, the Review Board assessed a slight demerit for an applicant principal's ownership of cable interests,

but he distinguished that case on the ground that Rivlin's holdings were significantly smaller and more remote. *See I.D.*, para. 155.[82] Century would assess a further demerit against WSCT-TV because of the "other media interests of WSCT's proposed pay TV franchise — ATC — . . . ."[83] We agree with the ALJ that none of the media interests asserted here against WSCT-TV presents any ground for comparative consideration. Mr. Rivlin's cable interests are *de minimis* and have no significance in a comparative contest. *See Gainesville Media, Inc.*, 70 FCC 2d 58, 63-64 (Rev. Bd. 1978). And, to the extent that subscription television service is relevant to the diversification criterion, Century has not shown what interests, if any, are owned by the STV franchise. All of the applicants are on relatively equal footing under the diversification criterion; no preference is awarded.

37. *Comparative Coverage.* The ALJ found that each applicant would serve areas and populations already receiving a minimum of five television services. *I.D.*, paras. 131, 178. With respect to the qualified applicants, WSCT-TV would provide service to the largest population, 4,997,204 in 5,280 square miles and Urban the smallest, 4,377,704 persons in 4,523 square miles. *Id.*, para. 131. The ALJ concluded that no party was entitled to a comparative preference under this criterion. *Id.*, para. 178. WSCT-TV challenges that conclusion, arguing that the ALJ erred in failing to give it credit for its proposal. We agree that none of the applicants is entitled to a comparative preference for its coverage proposal. Although the Commission will generally award a preference, albeit slight, to applicants with substantial coverage advantages over its competitors even when the entire service areas are well-served (five-or-more services) by existing stations, *see Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1341 (Rev. Bd. 1984), all of the instant proposals are within a 10% population deviation separating the largest and smallest. Even the smallest population differentials in the cases cited by WSCT-TV are nearly double that found here, and no decisional preference will be awarded. *See generally Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962 (Rev. Bd. 1978) (population coverage difference of approximately 5% yields no preference).

38. *Auxiliary Power.* WCTO urges that the ALJ erred in failing to accord it a comparative preference for proposing an auxiliary power source. The *I.D.* rejected both WCTO's and Century's claim for such a preference, noting that the Commission had made no provision for this

[82] WCTO, Century, and Capital also urge that a diversification demerit be imposed against WSCT-TV for the potential interests of Syncom (*i.e.*, warrants in 11 AM, 3 FM and 2 television stations and in 3 cable systems). We have discounted Syncom as an owner of WSCT-TV, *supra*, paras. 21-26.

[83] Century Exceptions at 45.

factor in television proceedings. *See I.D.*, para. 177, *citing Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966). Subsequent to the *I.D.'s* rulings, the Review Board contemplated the *Policy Statement's* obvious intent and accorded a television applicant a minor preference for its auxiliary power proposal. *See San Joaquin Television Improvement Corp.*. 54 RR 2d 1206, 1214 (Rev. Bd. 1983). Accordingly, we will award both WCTO and Century very slight preferences for auxiliary power.

Miscellaneous Issues

39. *Capital Communications.* Capital's President and 12.5% stockholder, is Ms. Diane Graham, *I.D.*, para. 23, who is also slated to work parttime at the station as Assistant Program Manager. *Id.*, para. 94. At the time of the hearing, Ms. Graham held a very high position in the United States government: Assistant Director of the United States Office of Personnel Management (OPM) for Affirmative Action Programs. *Id.*, para. 23. Whereas broadcast applicants are expected to advise the Commission if any of their principals are involved in other litigation which might affect their qualifications, Capital did not advise that Ms. Graham was the particular government official charged with discriminatory hiring practices in *Velez* v. *Devine*, No. 81-1225 (D.C., filed February 9, 1982) (Gesell, J.), 28 FEP Cases 671.[84] Although the ALJ charged Capital with a comparative demerit for failure to inform the Commission of the litigation centering on Ms. Graham while the *Velez* cases was *sub judice*, *I.D.*, para. 180, he assessed no demerit against Capital based on the adverse outcome of that case. Capital's opponents seek its disqualification or, at minimum, a comparative demerit based on U.S. District Court Judge Gesell's factual findings in the case.[85]

40. The ALJ's description of the *Velez* case, *see I.D.*, paras. 23-24, is perfectly accurate, and Judge Gesell did specifically and expressly find that Ms. Graham violated Title VII of the Civil Rights Act of 1964 by denying one Ms. Velez a particular government position because Ms. Velez was female. In so doing, he explicitly credited testimony that Ms. Graham "preferred a man for the position," 28 FEP Cases at 673, and further found that Ms. Graham's testimony and her defenses were entitled to no weight. While the *Velez* case, a local *cause celebre* when it was announced, struck many as anomalous in finding that the black female Assistant Director of OPM for Affirmative Action would discriminate against a female job applicant because of her sex, thus tending to undermine the operative assumption that affirmative action programs and

[84] Mr. Devine was the Director of OPM at the time, and was named as the statutory defendant.

[85] *See* WSCT-TV Exceptions at 11-17; Century Exceptions at 35-38.

high management positions for women will eliminate discrimination, this Board will not second-guess a federal district court judge on whether Ms. Graham violated Title VII on that occasion or relitigate the merits of *Velez.*[86] *See, e.g., Focus Television Co.*, FCC 84R-59, released August 30, 1984, at paras. 4-10 (specific findings of fraud by federal judges re applicant considered by Board; applicant assessed "substantial and decisive comparative demerit"). Under the Commission's *Uniform Policy on Violation of Laws*, 42 FCC 2d 399, 403 (1951), the agency will take cognizance of final decisions of other reliable tribunals *and then* independently determine whether the violation of law adjudicated in that tribunal impacts upon the applicant's character qualifications.[87] The Commission is clearly interested in compliance with equal employment strictures, *Nondiscrimination In Employment Practices*, 13 FCC 2d 766 (1968), and — while not a technical party to the *Velez* case — Ms. Graham was clearly *the* culpable principal in that case. *See I.D.*, paras. 23-24; *Velez.* However, under the *Uniform Policy*, merely taking cognizance of a judicially determined offense is not dispositive of the licensing question before the Commission. *See, e.g., NLT Corp.*, 52 RR 2d 817 (1982). A number of factors are then considered to determine what impact, if any, the adjudicated violations have on the applicant's basic character qualifications or its predictive compliance with FCC rules or policies.[88] In *NLT*, for example, the Commission found that the licensee's record did not give rise to a conclusion that it had "engaged in a pattern of employment discrimination nor to a conclusion that it does not take its E.E.O. commitments seriously." *Id.*, at 825. In this case, the ALJ found — without dispute or contradiction — that Ms. Graham had held her position since 1979, had personally "participated in more than 40 hiring decisions,"

[86] We acknowledge that the *Velez* case is not a matter *res judicata* before the Commission; neither the Commission nor Ms. Graham were legal parties to that case. *See* Capital Reply at 2-6.

[87] *See Community Television of Southern California* v. *FCC*, 103 S.Ct. 885, 892 (1983) (FCC "obligated" to consider relevance of violations of "any other federal statute"); *cf. Lebanon Valley Radio, Inc.* v. *FCC*, 503 F.2d 196 (D.C. Cir. 1974), where the court criticized the Commission for ignoring the decisions of a state court in resolving a hearing issue. Although the doctrine of *res judicata* was not there applicable, the court said that "the Pennsylvania court's decisions are relevant." *Id.*, at 200. Indeed, to the extent that current Commission policy is perceived as one of refusing to litigate questions of law violations more directly addressable to another forum, *see Alan K. Levin*, 55 RR 2d 981, 983-985 (Rev. Bd. 1984) (majority opinion) (applications for review pending), failure to take cognizance of the decisions of another tribunal which *has* litigated the subject offense would result in absolute neglect of the offense, thus reducing our *Uniform Policy* to a nullity.

[88] *See RKO General, Inc.*, 78 FCC 2d 1, 27-28 (1980), where the Commission indicated that it would consider the nature, frequency and recency of the offense as well as the offender's relationship to the applicant.

and has had no similar allegations of bias against women lodged against her. *I.D.*, at para. 27. Moreover, several female witnesses with "long-standing" records of working against employment discrimination testified as to Ms. Graham's interest in promoting women. *Id.*, para. 28. Insofar as the record before us shows, therefore, the *Velez* case is precisely what it appears to be at first blush: an embarrassing anomaly from which no enduring adverse inferences can be drawn and which, in view thereof, would warrant no more than a slight comparative demerit. *Cf. Central Texas Broadcasting Co.*, 90 FCC 2d 583, 592-593 (Rev. Bd. 1982) (subsequent history omitted) (no decisionally significant adverse inferences drawn from various violations of other laws).

41. At the same time, and at a minimum, we affirm the comparative demerit charged against Capital for its utter failure to inform the Commission of the charges against its President, Ms. Graham, until the *Velez* case became publicly notorious because of Ms. Graham's particular government office and the peculiar nature of the charge against her. *See I.D.*, paras. 134, 180. Despite an interrogatory asking whether any of Capital's principals was an "officer, director, or principal" of any other entity involved in immediate litigation,[89] Ms. Graham volunteered no data whatever about the *Velez* case or its pendency. Ms. Graham, as Assistant Director of OPM, was obviously an "officer, director, or principal" of the federal government within the purport of the interrogatory, and the fact that the *Velez* suit specifically focused on her as *the* offending principal in a charge of sex discrimination renders specious her excuse that she did not disclose the *Velez* matter because she was not a "political appointee."[90] The *Velez* case and its subject matter were clearly related to her qualifications as the President of a broadcast applicant, and the pending litigation should have been disclosed,[91] *even in the absence of a specific interrogatory. See* 47 U.S.C. §1.65; *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (*cert.* history omitted). As suggested in *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946), Ms. Graham's conscious failure to disclose the *Velez* matter may be as significant in assessing her (and Capital's, *see WOKO*, at 229) qualifications as the underlying matter

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[89] *See* Capital Exceptions at 44. Misleading matter submitted in an agency adjudicatory proceeding is actionable, even if not submitted directly to the agency. *Publix Television Corp.*, 36 FCC 1215, 1219 (1964).

[90] *See I.D.*, para. 132. *See also* Capital Exceptions at 43-44; therein it is claimed that Ms. Graham considered only "political appointees" to fit within the purview of the interrogatory.

[91] *See United Broadcasting Co., Inc.*, 94 FCC 2d 938, 953-955 (Rev. Bd. 1983) (applications for review pending), where we charged an applicant with a comparative demerit for not disclosing that a former 5% principal had pled guilty to a charge of violating 18 U.S.C. §209 (bribing a government official). The principal's excuse — a narrow reading of the term "found guilty" on our application form — was rejected.

itself. And, as the court recognized in *RKO General, supra,* the Commission must rely on the "completeness" as well as the accuracy of answers provided in its proceedings, and Ms. Graham has not met the Commission's standard of complete candor in a matter where her motivation to withhold the information was manifest. *See* 670 F.2d at 232. Because Ms. Graham is Capital's President, we squarely affirm the ALJ's imposition of, at least, the "moderate demerit" assessed against Capital for a lack of candor. *I.D.,* para. 184.[92]

42. *Petitions to Enlarge Issues.* Century contends that the ALJ erred in denying a host of issues requested against the various competing applicants. Because many of the issues requested go against applicants who have here lost on a comparative basis, it is unnecessary to consider most of the issues sought.[93] One exception, though, needs to be addressed since it involves Urban. To wit, Century notes that it filed a petition to clarify whether the proposals of certain applicants, including Urban, to provide subscription television (STV) service by means of an independent STV franchise was comparatively cognizable. Century's rationale is that proposals to provide STV programming through an unrelated programmer result in large blocks of broadcast time becoming the day-to-day responsibility of a third party. By *Memorandum Opinion and Order,* FCC 81M-4113, released December 31, 1981, the ALJ denied Century's request, observing that virtually all television stations rely on other entities for large segments of their programming. That order also observed that no precedent had been cited where the Commission had ever detracted from an applicant's comparative qualifications for proposing STV operations. We concur with the ALJ's ruling because the Commission has indicated that it will compare applications contemplating STV operations by "employing traditional comparative criteria and not compar[ing] the program proposals." *See Subscription TV Program Rules,* 85 FCC 2d 631, 637 (1981). Moreover, the ALJ was manifestly correct in noting that virtually all television licensees — commercial and noncommercial — rely heavily on third party program suppliers, including networks, syndicators, and barter packagers. Potential reliance on such sources by broadcast applicants, *simpliciter,* does not effect comparative elements such as diversification or integration.[94]

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[92] Because Capital loses on other comparative grounds, it is not necessary to decide whether the lack of candor exhibited here by its President warrants complete disqualification of Capital. *Compare RKO General, supra* (applicant disqualified for lack of candor), *with United Broadcasting, supra* note 91. The comparative demerit we assess would, in any event, place Capital at the bottom of the ladder.

[93] For that reason, we need not rule on Century's request for a financial issue against WSCT-TV filed on June 17, 1983.

[94] What is given, may be taken away — or never materialize at all, *see supra* para. 26 (applicant never obtains intended STV franchise).

Comparative Summation

43. All decisionally significant exceptions have been considered. All remaining applicants except Grant have been found basically qualified to be a Commission licensee. Comparatively, Urban is the superior applicant under the integration criterion and is thus entitled to a preference over its rivals; WCTO and Century have also received very slight preferences for proposing auxiliary power equipment; and Capital has been assessed at least a moderate demerit for its lack of candor. No other preferences or demerits have been awarded or assessed. Because integration is one of the most essential components of the best practicable service objective (*see Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 395 (1965)), far outweighing auxiliary power, the comparative balance tips in Urban's favor. Hence, we affirm the ALJ's ultimate *S.I.D.* conclusion that a grant of Urban's application is preferred under the criteria of the *Policy Statement* and interpretative Commission precedent.

44. ACCORDINGLY, IT IS ORDERED, That the request for dismissal of application filed by Washington Television, Inc. on August 14, 1984, IS GRANTED; and

45. IT IS FURTHER ORDERED, That, the petitions for leave to amend filed by WSCT-TV, Inc. on February 17, April 13, June 6, and June 23, 1983, and its petition for leave to file reply pleading, filed June 23, 1983, ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend filed by Capital Communications of Washington, Inc. on April 27, 1983, IS GRANTED, and the amendment IS ACCEPTED; that the motions for leave to amend filed by Grant Broadcasting Corporation on May 7, May 29, July 2, and August 15, 1984, ARE GRANTED, and the amendments ARE ACCEPTED; that the motions for leave to amend filed by Urban Telecommunications Corporation on June 14, 1983 and May 4, 1984, ARE GRANTED, and the amendments ARE ACCEPTED; that the petitions for leave to amend filed by Washington Television, Inc. on March 25 and June 30, 1983, and March 19 and April 5, 1984, ARE DISMISSED as moot; that the petition to reopen the record and enlarge the issues filed by Century Communications, Inc. on June 17, 1983, IS DISMISSED; and that the motion to correct transcript filed by WSCT-TV, Inc. on September 5, 1984, IS GRANTED; and that the petition for leave to amend filed by Washington's Christian Television Outreach, Inc. on October 1, 1984, IS GRANTED; and the amendment IS ACCEPTED; and

46. IT IS FURTHER ORDERED, That, any grant of a construction permit to Urban Telecommunications Corporation will be subject to the condition that Mr. Theodore White divest himself of all interest in Channel

30, Nashville, Tennessee[95]; and

47. IT IS FURTHER ORDERED, That the application of Urban Telecommunications Corporation (File No. BPCT-800118KN) for authority to construct a new television station at Arlington, Virginia, IS GRANTED; the applications of Washington's Christian Television Outreach, Inc. (File No. BPCT-5042), Century Communications, Inc. (File No. BPCT-800117KE), Capital Communications of Washington, Inc. (File No. BPCT-80118KF), Grant Broadcasting Corporation (File No. BPCT-80118KK), and WSCT-TV, Inc. (File No. BPCT-800118KP) IS DENIED; and the application of Washington Television, Inc. (File No. BPCT-800118KO) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[95] White pledged unequivocally to divest himself of any interest he might acquire in the Nashville station should Urban's Arlington application be granted. Our grant here will be conditioned on the effectuation of that pledge. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 814 (Rev. Bd. 1982), *aff'd*, FCC 83-368, released September 15, 1983 (Comm'n).

FCC 84D-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Washington's Christian Television Outreach, Inc. Washington, D.C.	BC Docket No. 81-528 File No. BPCT-5042
Century Communications, Inc. Washington, D. C.	BC Docket No. 81-529 File No. BPCT-800117KE
Capital Communications of Washington, Inc. Washington, D. C.	BC Docket No. 81-530 File No. BPCT-800118KF
Grant Broadcasting Corporation Washington, D. C.	BC Docket No. 81-533 File No. BPCT-800118KK
Urban Telecommunications Corporation Arlington, Virginia	BC Docket No. 81-536 File No. BPCT-800118KN
Washington Television, Inc. Washington, D. C.	BC Docket No. 81-537 File No. BPCT-800118KO
WSCT-TV, Inc. Washington, D. C.	BC Docket No. 81-538 File No. BPCT-800118KP
For Construction Permit	

Appearances

Riley W. Murphy and *Dean George Hill* on behalf of Washington's Christian Television Outreach, Inc.; *Roy W. Boyce* and *Morton L. Berfield* on behalf of Century Communications, Inc.; *Heidi P. Sanchez* and *Benito Gaguine* on behalf of Capital Communications of Washington, Inc.; *Jonathan Ginsburg* and *E. William Henry* on behalf of Grant Broadcasting Corporation; *James K. Edmundson* on behalf of Urban Telecommunications Corporation; *Steven C. Schaffer* and *Louis Schwartz* on behalf of Washington Television, Inc.; and *Michael H. Rosenbloom* and *Barry A. Friedman* on behalf of WSCT-TV, Inc.

Supplemental Initial Decision Of Administrative Law Judge Eduard J. Kuhlmann

Issued: March 16, 1984; Released: March 23, 1984

1. The *Initial Decision*, FCC 83D-2, 94 FCC 2d 1369, released January 24, 1983, was appealed to the Commission's Review Board, exceptions were filed April 25, 1983, oral argument before the Board was held on June 28, 1983. In a *Memorandum Opinion and Order*, FCC 83R-62, 94 FCC 2d 1360, released 8-31-83, the Review Board remanded the applications for additional hearing on several issues considered in the *Initial Decision.*

2. The Review Board's interest in additional information was considered pursuant to the following issues:

Urban Telecommunications Corporation Financial Issue:

1. (a) Whether AMVEST Leasing and Capital Corporation qualifies as a financial institution or a financially qualified lessor and, if so, whether the leasing commitment letter is satisfactory under the standards of the June 1977 version of FCC Form 301.

(b) Whether the loan commitment letter supplied to Urban by the National Bank of Commerce is in accord with Commission requirements.

WSCT's Arrangement with Syncom:

2. To determine whether Formula-WSCT's January 14, 1981 agreement with Syncom gives Syncom a right to participate in the financing of WSCT-TV and to determine whether Syncom has an unconditioned right to warrants and to convert the warrants into common stock.

Anderson Commitment:

3. (a) To determine the circumstances surrounding Washington Television, Inc. principal Joann Anderson's failure to fulfill her integration pledge at the Tallahassee, Florida FM facility licensed to Amrad Corporation.

(b) To determine, in light of her actions there, whether it can be concluded that her integration pledge in this proceeding is seriously advanced and can be seriously regarded.

3. A prehearing conference was held on October 5, 1983; oral cross-examination was conducted on December 13 and 14, 1983; supplemental proposed findings of fact and conclusions of law were filed by all parties on January 27, 1984; and replies were filed on February 6, 1984 by all applicants but Grant.

Urban Telecommunications Corporation's Financial Qualifications

4. On November 23, 1983, Urban petitioned for leave to amend its financial showing to include a letter from the Mercantile-Safe & Trust Company, Baltimore, Maryland promising to lend Urban $1,500,000. In addition, Urban amended its application to include a letter from the broadcast equipment manufacturer, RCA. These two amendments substantially changed Urban's financial proposal. Urban requires $1,284,500 to construct and operate for three months and the new loans satisfy that need. Because further inquiry about Urban's financial plan was unnecessary in light of its new showing, summary decision was granted. *Memorandum Opinion and Order,* FCC 83M-4630, released December 13, 1983.[1]

Supplemental Findings of Fact

WSCT-TV's Arrangement to Borrow from Syncom

5. The Commission was informed about the possibility of a loan from Syncom in amendments filed by WSCT-TV to its application. In an amendment filed September 15, 1980, WSCT-TV submitted a September 11, 1980 letter from Syncom. The letter provides "an expression of [Syncom's] formal interest in participating in the financing . . ." of Formula's construction and start up for Channel 14. The initial letter

[1] WSCT-TV requested permission to appeal to the Review Board the grant of summary decision on the eve of the hearing. No action was taken at the time on its request because even if an appeal had been permitted and the Review Board found an evidentiary inquiry necessary, it arose too late to avoid the scheduling of more hearing sessions. WSCT-TV's request also lacked the necessary legal support. Its principal argument appears to be that Urban was required to pursue only its original financial proposal and that WSCT-TV has a right to test (if not a stake in) that proposal. It is a proposition that finds no support in the Board's decision. The Board's opinion directed reconsideration of Urban's financial showing because the original review was found by the Review Board to be "hasty" and "unduly harsh." The Board reversed the original finding that Urban was financially unqualified and directed that additional consideration of Urban's finances be guided by the Commission's decision in *Anax Broadcasting, Inc.,* 87 F.C.C. 2d 483, 487-88 (1981). The thrust of the Commission's opinion in *Anax* is that broadcast applicants should be permitted to cure financial defects to preserve their comparative standing. Urban chose the simplest course by offering a new financial proposal that was without defects. (WSCT-TV has, of course, failed to raise substantial public interest questions about the merits of Urban's new proposal.) Moreover, aside from the proposal's merits, its acceptance in place of the earlier flawed proposal provided the least disruptive means of considering Urban's financial qualifications.

proposed a loan of $300,000 at 13 percent interest and "in consideration for its participation, Syncom will receive rights to acquire stock." In addition, "as part of Syncom's investment" it would advance Formula $10,000 which would be evidenced by a 12 percent demand note that would mature when the construction permit was issued or two years from the date of the note. Syncom also stated that when the $10,000 was advanced it "would require the execution of a contract providing details of Syncom's rights pursuant to Formula's offering memorandum dated on August 15." The contract, Syncom explained, would "spell out the significant terms as they relate to a proposed formal lending and investment agreement, which [would] be executed between Syncom and Formula when a construction permit is issued."

6. On January 16, 1981, WSCT-TV filed another amendment with information about its Syncom loan. The documents submitted with that amendment are in WCTO Exhibit 14 and WSCT-TV Exhibit 30. The amendment included a December 17, 1980 letter from Syncom to Formula. Syncom stated in that letter its intention to provide up to $500,000 of long term subordinated debt financing to Formula for the Channel 14 proposal. In order to receive the loan, Formula had to meet certain conditions: It had to execute a subscription television agreement with American Television and Communications Corporation (ATC); secure $250,000 in lease purchase agreements for equipment; and at the closing, issue to Syncome $300,000 in 14 percent ten year subordinated notes with a three year moratorium on principal payments. In partial consideration for the $300,000, Syncom would receive warrants to purchase common stock. The exact amount of stock would depend on how much equity was raised by Formula from other sources, but it could be as much as 26 percent and no less than 10 percent.

7. Syncom also stated in the December 17, 1980 letter that it would make $200,000 available to Formula, pursuant to the terms of the lending agreement, that could be borrowed after the $300,000 was lent. In addition, Syncom said that it was prepared to lend $10,000 at 16 percent per year to Formula in the interim for its program and production business.

8. The December 17, 1980 letter provided that the warrants were to be restricted by a put and call agreement that would give Syncom "the right to sell all or part of its warrants to Formula (the "put") at any time during the fifth through the tenth year after the date of closing" and Formula "the right to purchase warrant shares held by Syncom" during the same period. "The number of shares put and/or called during any one year will be consistent with the debt service requirements of the senior lender." Syncom stated in the December 17, 1980 letter that the letter could be "construed as a firm commitment on the part of Syncom . . .." And

Syncom sought formal acceptance of the terms by having Formula's shareholders sign or accept the letter. Syncom also warned Formula that the terms of the letter were not all inclusive but are only a "reasonable description of the proposed financing." All of the stockholders of Formula accepted the terms.

9. The January 16, 1981 amendment also included a note for the $10,000 loan and a document labeled "Agreement." The Agreement was dated January 14, 1981 and was signed by Herbert Wilkins as President of Syndicated Communications, Inc. and Syncom Capital Corporation and George C. Corbin, III, President of Formula Telecommunications, Inc. The Agreement stated that Syncom intended to lend Formula $500,000 for start up and construction of Channel 14; that Formula agreed to sell Syncom rights to purchase up to 26 percent of Formula's common stock, conditioned on Formula receiving a construction permit; that in consideration of a January 9, 1981 loan of $10,000 made by Syncom to Formula, Formula agreed to provide Syncom with the "right to purchase warrants and to participate in financing for the start-up and construction of FTI's station and other business operations as outlined in Syncom's commitment letter to FTI dated December 17, 1980;" that the right to purchase warrants and participate in the financing would expire on January 9, 1985; that the rights of Syncom to participate in the financing could "not be abridged by any other event or occurrence which might take place between now and the expiration of right to purchase warrants;" and that Syncom could assign its right to purchase warrants to a third party with the approval of Formula.

10. Herbert P. Wilkins and George C. Corbin, III, who signed the Agreement for the parties, testified about it. Mr. Wilkins said that Syncom never had an unconditioned right to participate in the financing of WSCT-TV, nor an unconditioned right to warrants or to convert the warrants into common stock. WSCT-TV Exh. 30 at 3. He also stated that Syncom would not assert a right to participate in financing or to receive warrants if WSCT-TV received a grant. *Id.*

11. In Mr. Wilkins' view, "[t]he entire process of Syncom's participation in the financing of WSCT-TV and Syncom's right derived therefore to obtain warrants . . . is conditioned on Formula's coming to Syncom to actually take down the proposed financing." *Id.* at 5. This view, he believes, is supported by the fact that nothing in the December 17, 1980 letter or the January 14, 1981 Agreement requires WSCT-TV to request money from Syncom. *Id.* at 5. Mr. Wilkins stated that Syncom's response to a WSCT-TV request for the funds would depend on WSCT-TV receiving a construction permit and having signed a subscription television agreement with American Television and Communications Corporation. *Id.* at 7-8.

12. Additionally, Mr. Wilkins testified that the facts have now changed significantly and Syncom will have to reconsider if it will participate in Formula's proposal. *Id.* at 6. The change he pointed to was ATC's recision of its STV agreement with WSCT-TV, which he views as ending Syncom's rights and obligations. *Id.* at 8.[2] He also claimed that, even if that were not the case, the Agreement gave Syncom no more than a right of first refusal to match financing terms that might be offered by another lender or investor. *Id.* at 6.

13. Mr. Wilkins said that if the December 17, 1980 letter and the January 14, 1981 Agreement are read together, as he urges they must, "Syncom has never had an unconditioned right to obtain either Formula's warrants or its stock" because "Syncom had no right to require Formula to accept financing from it under the terms contained in the December 17, 1980 letter." *Id.* at 8-9. He agrees with Mr. Corbin that Syncom had at most a right to only equal any offer another lender might make to Formula. Tr. 3123-24, 3158. However, if the parties were to proceed with the loan, in Mr. Wilkins' view, the warrants could only be exercised pursuant to the put and call agreement which has not been fully negotiated. *Id.* at 9. But as currently planned, he pointed out, the warrants could be sold only during the fifth to the tenth year after the date of the closing on the financing. Id. He also stated that Syncom would be prepared to forgo any right to convert the warrants for the first five years following the commencement of the proposed television station's operations. *Id.* at 10. From the fifth to the tenth year, he noted, the warrants could be called by Formula. *Id.*

14. Syncom currently holds warrants in a number of broadcasting companies, but it has never converted its warrants into common stock. *Id.* at 10. It has a policy against the exercise of warrants to avoid ownership under the Commission's multiple ownership rules. Tr. 3113-14, 3116-17, 3131, 3145-46, 3148, 3153-54. In providing for warrants, Syncom believes that if a broadcast entity it has financed should sell the station, it will be able to sell the warrants to the purchaser and thereby equalize the gains and losses it has had on its various investments in broadcast stations. Tr. 3116. Syncom intends to remain passive in the operation of the companies it finances if for no other reason than it does not possess the knowhow to operate a broadcast station. Tr. 3115, 3148.

15. Mr. Corbin stated that WSCT-TV also believes that the January 14, 1981 Agreement did not give Syncom a right to participate in the financing of WSCT-TV until Formula actually sought the money. WSCT-TV Exh. 31, at 2. He pointed out that WSCT-TV does not intend to borrow

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[2] On June 6, 1983, WSCT-TV filed a petition for leave to amend to inform the Commission that on May 2, 1983 ATC told WSCT-TV that it would terminate its STV contract. The amendment which is unopposed is pending before the Review Board.

money from Syncom and, therefore, the warrants will not be issued to Syncom. *Id.* at 3. The $10,000 loan that Syncom made to WSCT-TV, he reported, was repaid on November 29, 1983. *Id.* at 4.

The Proposal of Washington Television, Inc. To Integrate Joann Anderson

16. Joann Anderson has promised to work at Channel 14 as the general manager. She is a 53.6 percent stockholder of Washington Television, Inc. Ms. Anderson, in 1974, as a principal in the Amrad Corporation, promised the Commission in an application for a new FM station at Tallahassee, Florida that she would be the station's full-time general manager. Ms. Anderson believed that this meant she would be at the station every weekday for eight hours. Tr. 3230.

17. Amrad received the grant and a construction permit was issued on June 8, 1975. Ms. Anderson worked with her husband to get the station on the air. WTI Exh. 12 at 4. She and her husband designed the building and supervised construction. *Id.* She also interviewed prospective employees, attended presentations for news and record services, monitored engineering activities and signed the loan papers. *Id.* The station began broadcasting on May 12, 1976.

18. She, however, did not become general manager. She testified that "during the early years we decided to hire an outside General Manager." *Id.* at 5. This was, she believed, an "interim measure[] compelled by special transitory circumstances which did not alter [her] basic intention." *Id.* Among the circumstances that intervened was a fellowship from the Rockefeller Foundation to pursue graduate studies to obtain a doctorate. *Id.* at 4, 5. She stated that she applied in September 1975 and began full-time graduate work in January 1976. *Id.* at 5-6.

19. In addition, Ms. Anderson said she believed the station needed someone with more experience than she had. *Id.* at 6. She believed the manager should have sales experience and be white in order to "ease acceptance of the station in the predominantly white business community of Tallahassee, Florida." *Id.* These two events arose "just prior to air time." *Id.* Instead, Ms. Anderson became the assistant manager and was at the station on about 90 percent of the regular work days. *Id.* at 7. From May 1976 to September 1977, she observed and learned about the station's operation. *Id.* at 8.

20. The general managers hired by Amrad were paid between $20,000 and $25,000. Tr. 3298. The first lasted less than two months and the second, Jim Broaddus, over a year and three months. He worked 50 hours per week. Mr. Broaddus managed the sales staff, handled promotions, hired all employees but the traffic manager, and worked with the staff. Tr. 3274, 3278-79. Ms. Anderson stated when she was assistant manager she spent about 30 hours per week at the station. Tr. 3285. The next hired

general manager, Bob McDermott, worked 40 hours a week with emphasis on sales. Tr. 3281-84.

21. After the general manager left in September 1977, she "dropped out of school for two quarters and took the title of General Manager for one of those." WTI Exh. 12 at 9. Although Robert McDermott became general manager in November 1977, Ms. Anderson continued to perform the duties she undertook when she became general manager in September 1977. During the three years Ms. Anderson owned the station, she promoted the station in the community, represented the station in industry groups, and regularly undertook such tasks as preparing the payroll, checking the logs, writing checks and keeping corporate records. *Id.* at 10-12.

22. Ms. Anderson began pursuing a fellowship for graduate studies within two months after Amrad received a construction permit from the Commission, in August 1975. Tr. 3234-3235. On September 10, 1975, Ms. Anderson filed a request with the Rockefeller Foundation for a fellowship to pursue a Ph. D. in early childhood education. WSCT-TV Exh. 32. She told the Rockefeller Foundation that she wanted to set up preschool programs that would create ideal learning situations for economically deprived children. *Id.* In October 1975, Ms. Anderson asked Rockefeller for a fellowship in business law. WSCT-TV Exh. 33. This time she told the Rockefeller Foundation that she was "interested in establishing a firm specializing in [business law] to provide assistance to blacks and the public at large in economic development." *Id.* When Ms. Anderson wrote to the foundation on November 19, 1975 she had changed her mind about pursuing a career in business law and she once again proposed to study early childhood education. Tr. 3245; WSCT-TV Exh. 34.

23. There is no evidence that Ms. Anderson ever informed the Rockefeller Foundation about her plans to manage a radio station. See Tr. 3237-39. It is the intent of the foundation to make grants to persons who will pursue a career in the area for which the grant is made. Tr. 3320-25. The record reflects that a grant was made to Ms. Anderson on the basis of her representation that she would become a leader in early childhood education. Tr. 3324; WSCT-TV Exh. 36 and Exh. 35. She received a stipend to replace any salary she might have foregone and to insure that she would attend graduate school on a full-time basis. Tr. 3324-28. Even before she received the fellowship, on October 19, 1975, Ms. Anderson applied to Florida State University. WSCT-TV Exh. 39. She was readmitted to the graduate school on December 9, 1975 and began her studies in January 1976. WSCT-TV Exh. 39. For the first two quarters she took 12 hours of credit and thereafter she took 9 hours during the two years of her fellowship. Tr. 3261. (Dr. Bruce Williams of the Rockefeller Foundation stated that a load of 12 credit hours "was high for a graduate

student" at Ms. Anderson's level. Tr. 3329.) Then she took 18 dissertation hours. Tr. 3263. Ms. Anderson estimates that she spent about a half-hour to an hour for each class. Tr. 3263. When she was writing her dissertation she worked three to four hours each day. Tr. 3264.

24. Ms. Anderson stated that she was concerned about notifying the F.C.C. that she would not be the general manager. Tr. 3271. Her counsel, Lawrence Miller, who is also a principal in the applicant, advised her not to. Tr. 3271, 3273. On April 22, 1976, Amrad filed F.C.C. Form 302 with the Commission requesting a license for WOWD, the Tallahassee facility. WSCT-TV Exh. 40. Amrad certified that it had met all the terms, conditions and obligations set forth in its application. *Id.*

Supplemental Conclusions

Syncom's Interest in WSCT-TV

25. WSCT-TV must establish what likelihood there is that Syncom will obtain warrants for WSCT-TV's common stock and under what circumstances Syncom could exercise the warrants. On remand the Review Board directed that this determination should be made on the basis of the principles it enunciated in deciding *Radio Laredo, Inc.*, 87 F.C.C. 2d 353 (Review Board 1981).

26. One of the applicants in *Radio Laredo*, Laredo Broadcasting Co., Inc. proposed as general manager, Ernest F. Barton, who is its vice president. Mr. Barton had an option to acquire 20 percent of the applicant's stock, but at the time of the hearing he owned no stock in the applicant. In the Initial Decision, the presiding judge found that there was no assurance about whether Mr. Barton would or would not acquire the optioned interest. Because of that uncertainty, Mr. Barton's potential interest in Laredo Broadcasting was treated as an existing interest and the stock he held in another broadcast station was weighed in assessing Laredo Broadcasting's media holdings. However, Mr. Barton's promise to serve as general manager was not counted in the applicant's favor, because it was not evident whether he would exercise his option and become an owner of the applicant. Here, the allegation is that there is no assurance that Syncom will not exercise potential common stock warrants in the applicant, WSCT-TV. However, unlike Mr. Barton, who indisputably held an option to acquire an interest in Laredo Broadcasting, there is a question about Syncom's current right to common stock warrants in WSCT-TV. This remand hearing was directed by the Review Board to fully explore that question.

27. The Review Board found that the January 14, 1981 Agreement between Syncom and Formula appears to provide Syncom, as partial consideration for lending Formula $10,000, the right to purchase common stock warrants and to participate in the financing of WSCT-TV's proposal

for Channel 14. Furthermore, the Agreement appears to provide that those rights cannot be abridged until January 9, 1985. At the remand hearing the parties to the Agreement, Syncom and Formula, stated that it was their intention in the January 14, 1981 Agreement to establish a right for Syncom to participate in financing the Channel 14 proposal only to the extent that Syncom would be willing to equal the terms of another potential lender. The January 14, 1981 Agreement provides, in their view, no more than a right of first refusal to Syncom.

28. The Syncom load of $10,000 to Formula, they claim did not have as part of the consideration to Syncom, either the right to participate in financing the Channel 14 proposal or a right to warrants in Formula. They cast doubt about any certainty that might attach to apparently contrary statements in the Agreement by pointing out that the note attached to the Agreement does not recite any consideration except interest for the $10,000 loan and that the January 14, 1981 Agreement explicitly provides that Syncom's rights were those provided in the December 17, 1980 commitment letter, which states that warrants will be given to Syncom for lending Formula $300,000 to build and operate Channel 14. While all of the other applicants urge that the Agreement is to be read without reference to Syncom and Formula's views, they do not explain how that can be done and still resolve the differences between the Agreement and the note and the December 17, 1980 commitment letter which are referenced in and attached to the Agreement.

29. Furthermore, while the Agreement states that Syncom's rights cannot be abridged, that statement carries little intrinsic meaning without reference to some other definition of rights. The preceding paragraph of the Agreement provides that the rights are enumerated in the December 17, 1980 commitment letter. The competing applicants argue that in interpreting Syncom's rights, the Commission should exclude all evidence outside of the Agreement, such as the views of the parties to the Agreement. That argument might make sense if the Agreement represented the complete views of the parties about the future loan for Channel 14, but that is not the case. Not only is the Agreement governed by the December 17, 1980 commitment letter, but that letter and the Syncom letter of September 11, 1980 specifically provide that the full details of the loan for the television proposal will be stated in a lending and investment agreement to be executed when a construction permit is issued. The December 17, 1980 letter also leaves for future consideration the writing of an agreement to govern the warrants. It is apparent that the full intentions of Syncom and Formula are in many respects still executory and that that fact lends substantial weight to Syncom and WSCT-TV's view that a final agreement, which would bind the parties, would come about only if WSCT-TV requests the loan.

30. Unlike the potential stockholder in *Radio Laredo, supra,* who actually held the option, Syncom only has a possibility of receiving warrants if WSCT-TV borrows from Syncom to build and construct. It is an event which WSCT-TV states will never occur. Moreover, even if Syncom were to receive the warrants, Syncom has indicated it would not exercise them for the first five years and then its general policy against owning broadcast stations would prevent it from converting the warrants to common stock and exercising control. There is then no uncertainty here of the sort that existed in *Radio Laredo.*

31. Thus, after fully exploring the views of the potential lender and the applicant, it is apparent that the possibility of Syncom exercising an ownership interest through conversion of warrants for Formula common stock does not in reality exist.[3] Although the possibility exists that, if Syncom were to receive the warrants, it might sell them, it stated, however, it would do so only if the facility were sold to another operator. This action would be consistent with Syncom's intention to use the warrants as a hedge against investment losses by receiving a greater profit on facilities that are sold.

Washington Television, Inc.'s Proposal to Integrate Joann Anderson

32. Joann Anderson is the largest stockholder in Washington Television, Inc. and she is the proposed general manager for the facility. In 1975, she was a principal in another broadcast applicant, Amrad Corporation, that applied for a construction permit to operate a new FM station at Tallahassee, Florida. Amrad stated in its application that Joann Anderson would be the station's manager. That proposal gave Amrad a strong comparative position against the other applicants in the proceeding. They settled with Amrad and a construction permit was issued to Amrad on June 8, 1975.

33. Within two months, nearly a year before the station was constructed and broadcasting, Ms. Anderson began to seek out and apply for fellowships for graduate study. When she applied, in September 1975, to the Rockefeller Foundation for a fellowship, she told the foundation that she wanted to study early childhood education and then a month later, in October 1975, she told the foundation that she would like to study business law to assist black economic development projects. In October 1975, even before she had resolved what course of study she would pursue, or received a fellowship, she applied to become a full-time

[3] All of the applicants who are competing with WSCT-TV argue for the first time on remand that this interpretation permits WSCT-TV to impermissibly upgrade its proposal. This argument's premise would be meritorious only if they were correct in their view that Syncom had an existing right to the warrants and could exercise it at will; it is a proposition which is not supported by the record.

graduate student at Florida State University. This occurred almost eight months before the station went on the air. She was readmitted to Florida State University in December 1975, received a fellowship from the Rockefeller Foundation to study for a doctorate in early childhood education, and in January 1976 became a full-time doctoral student.

34. Ms. Anderson admits that she did not, except for a brief two month period, actually hold the title of general manager at the station and perform the full functions of that job. She also testified that she did not spend 40 hours a week at the station as she originally promised. While she, in part, excuses this change because of her lack of experience and fear of the white community's unfavorable reaction to a black station manager, the decision to undertake a full-time Ph. D. program occurred long before she foresaw these problems, which she said arose as the station was about to go on the air.

35. She attempts to demonstrate that from the outset she effectively managed the station, but her actions are contrary to her claim. When she actually undertook the job of general manager for a brief two month period beginning in September 1977, she completely altered her regimen and withdrew from graduate school. At all other times, according to the Rockefeller Foundation, the organization that financed her education, she was a full-time doctoral student who often carried a greater than average course load. Moreover, as soon as another general manager was hired, in November 1977, she resumed her studies. If she had actually been the station's general manager all along, as she claims, there would have been no apparent reason for making these changes in her schedule when she officially became general manager. At the same time, when managers were hired at the station, it is evident they were not mere standins or persons who needed the supervision of an inexperienced owner; they were people with managerial experience and were paid accordingly.

36. Although Ms. Anderson was given an opportunity to inform the Commission about the change in her plans when the license was sought in 1975, Amrad told the Commission that it would meet all the terms, conditions and obligations made in the application. Nevertheless, Amrad knew that that would not be the case. Now that the facts are fully known about this issue, it is no longer apparent that Ms. Anderson's promise to manage Channel 14 is reliable. If her actions in Tallahassee are a clue to the future, it cannot be concluded that she will perform her promise.

37. While her testimony reflects that she believed that when she made her promise to the Commission to manage the station in Tallahassee, she was promising for the long term, not the short, her promise fails to meet the claim also. She did not manage the station over the long term either; indeed, she held the license for only one license term before she moved on to other business. She offers other excuses for not managing the station

but those reasons arose long after she had made plans to pursue full-time graduate study.

38. There is no direct evidence that Ms. Anderson did not intend to manage the Tallahassee station when the Amrad application was filed, but all of her actions thereafter indicate that she did not feel bound by her earlier representation to the Commission that she would manage the station on a full-time basis. Under these circumstances there is no choice but to deny Washington Television, Inc. credit for her promise and to reduce Washington Television, Inc.'s integration proposal by 53.6 percent.

Reconsideration of the Comparative Case

39. In the Initial Decision no consideration was given to the comparative case of Urban Telecommunications Corporation because Urban was found to be financially unqualified. That finding was reversed by the Review Board. In the remand proceeding Urban submitted a new financial proposal which demonstrated that it is financially qualified. This finding alters the comparative case and the conclusion reached for the following reasons:

Diversification of Control of the Media of Mass Communications

40. Urban is wholly owned by Theodore M. White. Mr. White, along with Page E. Silver, who is Vice President and Secretary of Urban, owns Page Broadcasting, which has a five percent interest in the Television Corporation of Tennessee, the holder of a television construction permit for Nashville, Tennessee.[4] Mr. White owns 75 percent of Page Broadcasting and Ms. Silver 25 percent. While only Mr. White owns stock in Urban, Ms. Silver is the only other person who is an officer and board member of Urban.

41. Although it is not known what importance the Television Corporation of Tennessee's facility will have on the Nashville market, the market is a significant distance from Arlington, Virginia and Page Broadcasting holds a small interest in the unbuilt station. The only difference between Mr. White's interest in the Tennessee construction permit and the negligible and decisionally insignificant media interests of the other applicants, Lonnie Murray and John F. X. Browne, stockholders in Washington Television, Inc., and Lewis Rivlin, a stockholder in WSCT-TV, is that Mr. White is the sole stockholder of Urban, while Messrs. Murray, Browne, and Rivlin are minority stockholders in applicants in this proceeding. This difference, however, does not warrant a different comparative result in assessing Urban's application from that reached with regard to Washington Television and WSCT-TV because Mr. White's interest in the Nashville CP is small and presents no risk of any

[4] These conclusions are based on the findings made in the Initial Decision at ¶40.

geographic concentration of ownership interest.[5]

Full-time Participation in Station Operation by Owners

42. The important consideration in this case is the applicants' proposals for participation in station operation by owners. Theodore White, because he is the sole owner of Urban and has promised to work at the station as the full-time general manager, provides the greatest quantity of integration.

43. The next best quantitative proposal is that of WSCT-TV, the applicant that prevailed in the Initial Decision. WSCT-TV proposes 78.04 percent full-time and 13.77 percent part-time participation by owners in the station's management. WSCT-TV is entitled to some credit for its part-time proposed integration of a 13.77 percent stockholder. However, the credit given for it drops sharply from that given for full-time proposals. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965).

44. "While . . . integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field." *Id.* at 396. Mr. White lives in Washington, D. C. and although he has applied for Arlington, Virginia, he lives within the central service area of his proposed facility.[6]

45. Like Urban's, all of WSCT-TV's integrated principals already live in the community, except Bill Tucker. Mr. Tucker lived in Washington at the time the application was filed, had lived in the community for several years, and would return if a grant is made. He holds a 4.61 percent interest. Mr. Tucker's absence from Washington diminishes WSCT-TV's local ownership, but the loss is so slight it is decisionally unimportant. His absence becomes decisionally unimportant because he was a resident of Washington when the application was filed, had been for several years before, and, has promised to return. In addition to local residency, WSCT-TV principals, Farrand, Rendon, and Alexander, have been active in the civic affairs of Washington, while Urban's Theodore White has not. When WSCT-TV's civic participation is considered, it is to be preferred over Urban on local residence.

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[5] In the Initial Decision a finding was made that Theodore White was also an applicant for a low power television station in Charlottesville, Virginia. That fact was not considered in the decision. On January 16, 1984, Urban moved to amend to inform the Commission that his application has been returned by the Commission's Mass Media Bureau. Urban has provided no explanation about the circumstances that caused Mr. White's application to be returned, whether he would refile, or whether he will have such an opportunity.

[6] No differentiation has been made in this proceeding between those stockholders who live in Washington, D. C. and those who live in the surrounding suburbs because the community to be served by a television facility in the Washington market includes the suburbs. In addition, all of Washington, D. C. and its suburbs will receive a city grade signal under all proposals.

46. WSCT-TV also would bring to its operation principals with "experience in the field." Messrs. Corbin, Farrand, Rendon, Tucker, and Alexander, who represent all of the full-time integrated WSCT-TV stockholders, have television experience and in some cases also radio experience. Mr. White of Urban has none.

47. Mr. White is black and Urban, therefore, proposes the greatest percentage of minority participation. WSCT-TV's proposal, however, would result in a greater number of minority group members becoming licensees. Messrs. Corbin (36.72 percent owner), Tucker (4.61 percent owner) and Alexander (11.47 percent owner) are black, Mr. Rendon (11.47 percent owner) is Hispanic, and Ms. Gilbert (13.77 percent owner) is a woman. Collectively these minority group members represent a controlling interest in WSCT-TV. Quantitatively Urban presents a greater percentage of minority participation but from a qualitative standpoint WSCT-TV would better fulfill the Commission's objective by bringing more minority group members and women into broadcasting. Both applicants will achieve the Commission's preference for minority control. See *Gilbert Broadcasting Corporation*, 91 F.C.C. 2d 450,469 (1982). It cannot be concluded that either Urban or WSCT-TV are to be preferred in terms of minority group participation; they both strongly meet the Commission's objectives in this area.

48. Qualitatively, WSCT-TV is to be preferred because of its local ownership and the experience of its integrated stockholders in the television business. But this qualitative preference does not overcome Urban's greater quantitative integration. WSCT-TV's broadcast experience is a factor of relatively minor significance and its local residency is nearly the same when qualitative residence factors are measured against quantitative promises of integration. *Merrimack Valley Broadcasting, Inc.*, 92 F.C.C. 2d 506, 516-17 (Review Board 1982). This is particularly the case if "qualitative enhancements are weighted in proportion to quantity of integration credit." *San Joaquin Television Improvement Corporation*, 54 Radio Reg. 2d (P.&F.) 1206, 1212 (Review Board 1983).[7] The Commission's public interest objectives in comparative cases require that Urban Telecommunications prevail over WSCT-TV on the basis of its

[7] WSCT-TV urges that the difference between its quantitative integration proposal and that of Urban's is without a public interest difference. In *San Joaquin Television Improvement*, the Review Board did not disagree with a claim that such an argument could be made about a 100 percent full-time integration proposal and one that promised 87 percent, although it did not reach the question. In *Merrimack Valley Broadcasting* the difference between a proposal of 70 percent and one that promised 58 percent was characterized by the Review Board as slightly greater than very slight. Here, of course, the quantitative difference between Urban and WSCT-TV is slightly greater than either of these recent cases decided by the Review Board.

proposal to integrate into management its sole owner, Theodore White.[8]

ACCORDINGLY, IT IS ORDERED that the request for permission to file appeal, filed December 12, 1983 by WSCT-TV, Inc. IS DENIED.

IT IS FURTHER ORDERED that the petitions for leave to amend, filed December 12, 1983 and January 6, 1984 by WSCT-TV, Inc. and January 16, 1984 by Urban Telecommunications Corporation ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the motion to correct transcript, filed January 27, 1984 by Washington Television, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the *Order* (FCC 83D-2) granting the application of WSCT-TV, Inc. (BPCT-800118KP), issued January 14, 1983 IS VACATED and the application of Urban Telecommunications Corporation (BPCT-800118KN) for a permit to construct a new commercial television station to operate on Channel 14 at Arlington, Virginia IS GRANTED.[9]

FEDERAL COMMUNICATIONS COMMISSION

EDWARD J. KUHLMANN, *Administrative Law Judge*

[8] WSCT-TV has again urged that its coverage is superior to the other applicants but again it has failed to demonstrate that any relevant differences are supported by the record or that the existing differences require that any applicant should receive a comparative preference.

[9] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Comparative Criteria
Staff Adequacy

Applicant with no media holdings receives substantial and decisive preference over one owning only broadcast station in proposed community. Staffing issue against winner is denied because plan was not on its face incapable of effectuation.
—*WFSP, Inc.*
MM Docket No. 83-689

FCC 84R-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WFSP, Inc. Kingwood, West Virginia	MM Docket No. 83-689 File No. BPH-820414AH
Preston Communications, Inc. Kingwood, West Virginia	MM Docket No. 83-691 File No. BPH-820903AH
Sandy S. Garlitz and Glenna R. Calvert d/b/a Buckwheat Broadcasting Company Kingwood, West Virginia	MM Docket No. 83-692 File No. BPH-820908AJ
For Construction Permit for a new FM station	

Appearances

Thomas W. Fletcher, on behalf of WFSP, Inc.; and *Jerrold Miller*, on behalf of Buckwheat Broadcasting Company.

DECISION

Adopted: September 17, 1984; Released: September 18, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of WFSP, Inc. (WFSP) and Sandy S. Garlitz and Glenna R. Calvert d/b/a Buckwheat Broadcasting Company (Buckwheat) for authority to construct a new FM broadcast station to operate on Channel 244A at Kingwood, West Virginia. By *Hearing Designation Order*, MM5256, released July 15, 1983, the applications were set for hearing on the standard comparative issue. In an *Initial Decision* (*I.D.*), FCC 84D-31, released May 15, 1984, Administrative Law Judge Joseph Chachkin (ALJ) granted Buckwheat's application principally on the basis of its substantial diversification preference over WFSP.[1] That preference was founded on WFSP's ownership of AM Station WFSP, the only broadcast facility licensed to Kingwood. We have reviewed the *I.D.* in light of WFSP's exceptions, Buckwheat's reply, and our examination of the record.[2] We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate choice of Buckwheat as the clear comparative winner. While we appreciate WFSP's natural ambition to retain a broadcasting monopoly in Kingwood, our appreciation does not go so far as to assist it in its happy endeavor or to unduly prolong its dominance in an era when "marketplace competition" is the byword.

2. *Diversification of Control.* WFSP's principal contention is that Buckwheat is not entitled to the substantial preference for diversification awarded by the ALJ because Kingwood receives other broadcast signals and has an operating cable television system and two weekly newspapers. Moreover, it states that the Commission favors permitting daytime-only AM stations to build companion FM facilities to provide fulltime service and, furthermore, that its proposal will provide greater service to underserved areas, thereby better achieving the Commission's objective of providing as many program choices to as many listeners as possible. Br. at 4-6. We disagree with these contentions.

3. We have long and consistently held that an applicant, such as Buckwheat, which has no media holdings, will be awarded at least a substantial preference over one, such as WFSP, which owns the only broadcast station in the proposed community of license. *See Brownfield Broadcasting Corp.*, 93 FCC 2d 1197 (Rev. Bd. 1983); *KBBS, Inc.*, 91 FCC 2d 115 (Rev. Bd. 1982); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976). Albeit other media are present in the area and the losing

[1] The ALJ also denied the competing application of Preston Communications, Inc., and that applicant has not filed exceptions. Accordingly, its application will be dismissed. *See* Section 1.276(f) of the Commission's Rules, 47 CFR §1.276(f).

[2] Oral argument was not requested in this case and the Board did not schedule oral argument on its own motion.

applicant's FM facility would have complemented its existing AM station, nevertheless, it is emphasized in these cases that the winning applicant will be providing a "new voice" to the community and is therefore entitled to a substantial preference. *See Communications Properties, Inc.*, 92 FCC 2d 45, 47 (Rev. Bd. 1982), *rev. denied*, FCC 83-320, released July 7, 1983; *Hassayampa Broadcasting*, 92 FCC 2d 472 (Rev. Bd. 1982), *rev. denied*, FCC 83-295, released June 28, 1983; *Nuance Corp.*, 85 FCC 2d 412, 421 (Rev. Bd.), *rev. denied*, FCC 81-473, released October 7, 1981. Moreover, WFSP's coverage advantage, which amounts to providing a fourth nighttime service to 576 more persons and a fifth nighttime service to 1,683 more persons than Buckwheat proposes to serve, was properly characterized by the ALJ as entitling WFSP to only a "very slight" preference. (*I.D.*, at para. 30.) *See Radio Jonesboro, Inc.*, 55 RR 2d 991, 996 (Rev. Bd. 1984); *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 758 (Rev. 1981), *rev'd on other grounds*, 54 RR 2d 1307 (1983); *Poet's Sent Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980). This small advantage in no way equals Buckwheat's diversification preference. In short, we affirm the ALJ's diversification analysis.

4. *Other Matters.* WFSP excepts to the ALJ's award of 100% full-time integration credit to Buckwheat on the grounds that its two 50% owners, Sandy S. Garlitz and Glenna R. Calvert, lack broadcast experience and have inadequately defined their prospective management roles at the station. Br. at 9-10. This exception is denied. Previous experience is not a requirement, *see Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951-52 (Rev. Bd. 1982), and both Buckwheat principals were correctly found by the ALJ to have suitably responsible management positions and to have described their proposed functions in sufficient detail to receive full credit. *See I.D.*, paras. 16, 18 and 26. Even were this not so, WFSP's resulting integration advantage (and its minor coverage edge) could not overcome the previously awarded substantial diversification preference to Buckwheat. *See Communications Properties, supra.* Buckwheat is the obviously superior comparative applicant.

5. Lastly, we reject WFSP's argument that the ALJ erred in declining to add a staffing issue against Buckwheat based on that applicant's proposal to operate 126 hours per week with a staff of four full-time employees. *See Memorandum Opinion and Order*, FCC 84M-1519, released March 27, 1984. Buckwheat also will hire additional part-time employees as necessary to operate the station. *See* Opposition to Petition to Enlarge Issues, filed December 28, 1983. The Commission will not delve into an applicant's staffing plan where, as here, that plan does not, on its face, appear incapable of effectuation and the proponent of the issue has not specifically demonstrated otherwise. WFSP's mere recitation of Buckwheat's proposal together with the speculative assertion that it

cannot be effectuated fails to meet this standard. *See Kenneth L. Crosthwait*, 79 FCC 2d 191, 199-201 (1980); *Harold James Sharpe*, 54 FCC 2d 1236 (Rev. Bd. 1975). We therefore affirm the ALJ's ruling.

6. ACCORDINGLY, IT IS ORDERED, That the application of Sandy S. Garlitz and Glenna R. Calvert d/b/a Buckwheat Broadcasting Company (File No. BPH-820908AJ) for authority to construct a new FM broadcast station at Kingwood, West Virginia, IS GRANTED; that the application of WFSP, Inc. (File No. BPH-820414AH) IS DENIED; and that the application of Preston Communications, Inc. (File No. BPH-820903AH) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 84D-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WFSP, Inc. Kingwood, West Virginia	MM Docket No. 83-689 File No. BPH- 820414AH
Preston Communications, Inc. Kingwood, West Virginia	MM Docket No. 83-691 File No. BPH-820903AH
Sandy S. Garlitz and Glenna R. Calvert d/b/a Buckwheat Broadcasting Company Kingwood, West Virginia	MM Docket No. 83-692 File No. BPH-920908AJ
For Construction Permit for a new FM station	

Appearances

Thomas W. Fletcher, on behalf of WFSP, Inc.; *Richard R. Zaragoza, Richard J. Bodoriff, David D. Oxenford, Janet M. Evans*, and *Angela Campbell*, on behalf of Preston Communications, Inc.; *Jerrold Miller* and *Mark E. Fields*, on behalf of Buckwheat Broadcasting Company; and *Paulette Laden*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 10, 1984; Released: May 15, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of WFSP, Inc. (WFSP), Preston Communications, Inc. (Preston) and Buckwheat Broadcasting Company (Buckwheat) for authority to construct a new commercial FM broadcast station on channel 244A in Kingwood,

West Virginia.[1] These applications were designated for hearing in a *Hearing Designation Order* released July 15, 1983 (MM 5256) on the following issues:

1. To determine which of the proposals would, on a comparative basis best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing, which of the applications should be granted, if any.

In addition, the designation order noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Therefore, the designation order specified that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue.

2. The prehearing conference was held in this proceeding on September 28, 1983. The hearing was held on November 28, 1983. The record was closed by Order released March 27, 1984 (FCC 84M-1519). Proposed findings of fact and conclusions of law were filed February 3, 1984 by the Mass Media Bureau and by the remaining parties on February 17, 1984; replies were filed March 2, 1984 by Preston and Buckwheat.

Findings of Fact

WFSP, Inc.

3. WFSP is a West Virginia corporation. Its officers, directors and shareholders are:

Arthur W. George	—	President, director and sole (100%) shareholder;
Sandra L. George	—	Secretary, Treasurer and director; and;
James M. Sams	—	Director.

WFSP Ex. 1, p. 2.

4. WFSP is the licensee of daytime only AM Radio Station WFSP, Kingwood, West Virginia (WFSP Ex. 3, p. 2). WFSP(AM) is the only radio station licensed to Kingwood, West Virginia or to any other community in Preston County, where Kingwood is located (Tr. 45). Two weekly newspapers are published in Preston County (Tr. 45). There is no daily newspaper published in Kingwood (Tr. 55). Nor is there any TV station licensed to Kingwood (Tr. 46). The cable television system operating in Kingwood does not originate any local programming (Tr. 45-46).

[1] The application of S. Dean Benson was dismissed with prejudice. See *Order* FCC 83M-3050, released September 6, 1983.

5. Mr. Arthur W. George, sole shareholder of WFSP, Inc., proposes full-time integration as General Manager of the new FM facility, should WFSP's application be granted (WFSP Ex. 2, p. 4). Mr. George currently is General Manager of WFSP(AM).[2] If WFSP receives a grant of the FM construction permit, Mr. George will continue to devote 10-15 hours per week to WFSP(AM). This allocation of time will be accomplished by having his wife, Mrs. Sandra L. George, assume the position of General Manager of WFSP(AM) (WFSP Ex. 2, p. 4). Mrs. George presently devotes 30 hours per week to WFSP(AM) in bookkeeping duties (Tr. 42-43). However, the use of a computer will enable the station's accountant to handle the bulk of the bookkeeping. Mrs. George's time devoted to bookkeeping will be reduced to three to four hours weekly (Tr. 56).

6. Mr. George has been a resident of Kingwood since 1969 (WFSP Ex. 2, p. 2). Mr. George served as Vice President of the West Virginia Broadcasters Association in 1976 (Tr. 38). Mr. George is one of the founders of the Thomas W. Perrill Memorial Scholarship fund which was established five or six years ago (Tr. 38-39). The fund is presently aiding four students a year by contributing $500 toward each of their college tuitions. Mr. George has been made honorary Chapter Farmer in the F.F.A. and is past President of the Boy Scouts Century Club. Mr. George is a past publicity chairman of the Preston County Buckwheat Festival (1977), which is the third largest festival in the State of West Virginia. He has been active in the past in fund raising events for the Kingwood Volunteer Fire Department, Kingwood Public Library (1976) and the Kingwood Parks and Recreation Center (1974). Mr. George's current local activity consists of membership on the Board of Directors of the Preston Country Club (WFSP Ex. 2, p. 3, 4; Tr. 38-39).

Preston Communications, Inc.

7. Preston is a corporate entity, with the following officers, directors and stockholders (Preston Ex. 1, p. 1, 2):

Name & Residence	*Office*	*Director*	*% Ownership*
Spencer K. Everly, Jr. 100 Orchard Ave. Kingwood, West Va.	President	Yes	51%
Rebecca B. Everly 100 Orchard Ave. Kingwood, West Va.	Vice–Pres., Sec'y.–Treas.	Yes	49%

8. Mr. Everly holds less than one percent stock ownership in Comsat Corp. (Tr. 67). Mrs. Everly, Preston's other principal, holds no media interests (Preston Ex. 1, p. 4).

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[2] Mr. George assumed the position of general manager of WFSP(AM) in 1969. In 1976, Mr. George purchased WFSP(AM) and continues to operate the station (WFSP Ex. 2, p. 2, 3).

9. Mr. Everly will serve in a full-time capacity (a minimum of 40 hours per week) as Program Director and Director of Engineering (Preston Ex. 2, p. 1, Tr. 68). If successful in obtaining the FM construction permit, Mr. Everly will devote considerable time to his engineering duties, which would taper off as the station becomes operational. Once operational, his engineering duties would involve a maximum of ten hours weekly (Tr. 68, 69). As Program Director, he would work with Mrs. Everly to develop and present a program format and oversee personnel in the presentation of the format (Preston Ex. 2, p. 2, 3). Mr. Everly may also take an air shift, if necessary, and may also do some selling (Tr. 70, 77).[3] Mr. Everly will terminate his employment with Comsat Corp. should Preston obtain the FM construction permit (Tr. 70, 71).

10. Mr. Everly served as technical consultant (as an independent contractor) for Radio Station WFSP(AM), Kingwood, West Virginia, for nearly six years, from mid-1975 until January 1, 1981. During this period, he averaged 10-12 hours per week on WFSP matters (Preston Ex. 2, p. 2). His duties for WFSP included maintenance of the studio and transmitting equipment; installation of new equipment; maintaining operation compliance within FCC standards; and, on one occasion, completion of the technical portions of the AM station's renewal application (Tr. 80-81).

11. Mrs. Everly proposes to serve in a full-time capacity (a minimum of 40 hours per week) as General Manager of the proposed FM station. As General Manager she would oversee financial planning, community and public relations, negotiate with vendors and station staff, seek compliance with Commission rules and regulations, program production and presentation, and sales and promotion (Preston Ex. 1, p. 2, 3; Tr. 95, 118). She would do no air shift (Tr. 95).

12. Mr. and Mrs. Everly, both 41 years of age, are essentially life-long residents of Kingwood[4] (Preston Ex. 2, p. 1). Mr. Everly has been involved in the following area civic and fraternal organizations, as indicated below:

> Member, Kingwood Kiwanis Club (Kiwanis International), 1968-present, (2-3 hours/week); also, Senior Vice President, 1970-71, First Vice President, 1971-72, and President, 1972-73.
>
> Member, Boy Scout Troop 81, Executive Committee 1977-present, (1-2 hours/week); also, Treasurer, June 1979-present.
>
> Member, Fraternal Order of Eagles AERIE 2391, 1979-present.

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[3] Mr. Everly stated that since the proposal involves a small market station, he and his wife will be "jacks or janes of all trades" (Tr. 78). In this connection, Preston proposes a staff of less than five full-time employees inclusive of Mr. and Mrs. Everly, and proposes to broadcast 17-18 hours during a typical broadcast day (Tr. 79, 94).

[4] Mr. and Mrs. Everly did not reside in Kingwood during the four year period (1964-1968) when Mr. Everly was employed at the National Radio Astronomy Observatory in Greenbank, West Virginia. Also, Mr. Everly lived in nearby Reidsville, West Virginia during his childhood (1951-1954) (Preston Ex. 2, p. 1; Tr. 67, 82).

Member, Board of Directors of KAMP Ambulance Service, 1972-75; also, President, 1973-74.

Member, Preston County Jaycees (1969-75)

(Preston Ex. 2, p. 3).

13. During her residence in Kingwood, Mrs. Everly has participated in the following civic and fraternal organizations, in the capacities indicated:

Volunteer work for Preston Memorial Hospital, Spring 1983 to present (1 hour/week).

Member of Susannah Wesley Circle (Wesley United Methodist Church), 1979 to present

Member of Parent Teacher Association, Kingwood Elementary School and active in Spring Carnival fund-raiser, 1971 to 1980; also, Vice President and parent tutor, 1978-79 (3-4 hrs/week), and President, 1979-80 (5 hrs/week).

Member, Kingwood Junior Women's Club, 1970-76 (5 hrs/week), and Secretary 1972-73.

Member, Beta Sigma Phi Social Sorority, 1970-76; also, Secretary 1971-72, President 1972-73.

Member, Women's Club of Kingwood, 1977-78.

(Preston Ex. 1, p. 4; Tr. 121).

14. Preston proposes to install auxiliary power generating equipment (Preston Ex. 1, p. 4).

Buckwheat Broadcasting Company

15. Buckwheat is a general partnership, comprised of the following (Buckwheat Ex. 1; 3, p. 1; 4, p. 1):

Name & Residence	*Nature of Interest*	*% Ownership*
Sandy S. Garlitz 102 Elkins Avenue Kingwood, West Va.	General Partner	50%
Glenna R. Calvert 188 Water Street Newburg, West Va.	General Partner	50%

Neither Ms. Garlitz or Ms. Calvert has any media interest.

16. Ms. Garlitz is proposed as the full-time station manager. She will directly supervise programming, engineering and sales personnel. She will also have responsibility for the selection of programming. Ms. Garlitz states that her role will be to come up with program ideas and then discuss it with Ms. Calvert and make program decisions more or less jointly (Buckwheat Ex. 3, p. 3; Tr. 177-178).[5]

[5] Buckwheat, like Preston, proposes a staff of less than five full-time employees, inclusive of the applicant's two partners (Tr. 139, 140). Buckwheat proposes to broadcast 18 hours a day during a typical broadcast day (Tr. 150).

17. Ms. Garlitz has been a resident of Kingwood since birth (Buckwheat Ex. 3, p.). Ms. Garlitz has been active in such Kingwood organizations as Boy Scouts, Girl Scouts, PTA, 4-H, Band Boosters and Athletic Associations, from 1963 up to and including 1973. She also belonged to the Business and Professional Women's Club (1963-66), Phythian Sisters (1967-72), and the Republican Women's Club (1964-72). At present, she is vice-president of the Kingwood Volunteer Fire Department Auxiliary. She is involved in the planning and preparation for the annual Preston County Buckwheat Festival. She is a volunteer counselor to the patients on the Alcoholic's Ward of the Preston County Memorial Hospital and is a member of the Hospital Auxiliary. She works with the Outreach Program for Senior Citizens on a regular basis. She is serving as a member of a task force formed by the County Board of Education to improve communications, and is serving on a citizens' advisory board for excellence in education. She is also working with the young people in the area to help organize a Young Republicans Club (Buckwheat Ex. 3).

18. Ms. Calvert is the proposed full-time general manager of the proposed station, in charge of overall supervision and direction of station operations (Buckwheat Ex. 4). Ms. Calvert will be concerned with the financial aspects of the station, *i.e.*, collecting money from advertisers, billing clients, insuring bills are paid. She will also be responsible for insuring that the station complies with FCC rules and will act as liaison between the station and the community. Her latter responsibility will involve the handling of correspondence, public relations and attending meetings of community organizations (Tr. 139, 158-160). Ms. Calvert will also be involved in the hiring of employees and decisions concerning the station's programming, although Ms. Garlitz will actually be in charge of those aspects (Tr. 139, 159). Ms. Calvert states that the description of her duties discussed *above* represents only a broad outline of what she will be doing (Tr. 160). She envisions her position as general manager and Ms. Garlitz as station manager to be of equal importance (Tr. 140-141).

19. Ms. Calvert is a resident of Newburg, West Virginia. Newburg is approximately thirteen miles from Kingwood and approximately 15 minutes by car. She has lived there continuously since 1968 (Buckwheat Ex. 4, p. 1; Tr. 129). Newburg is located within Buckwheat's proposed 1 mV/m contour (Buckwheat Ex. 5). Should Buckwheat receive the FM construction permit, Ms. Calvert will move to Kingwood (Buckwheat Ex. 4, p. 2). Ms. Calvert is and has been since 1964 office manager of a coal company in Tunnelton, West Virginia (Buckwheat Ex. 4). She will terminate this employment in the event of a grant of Buckwheat's application (Tr. 149).

20. During the past five years, Ms. Calvert has served as an elected member of the Town Council of the Town of Newburg, served as Town Recorder, Town Clerk, Town Treasurer, and Public Relations Advisor for the Town of Newburg; was appointed by the Preston County Commission as its representative on housing with the Region VI Planning and Development Council; was elected Lyon District Committeewoman for the Democratic Executive Committee; and served as Treasurer for the Preston County Democratic Executive Committee. She is presently serving as a member of a task force formed by the County Board of Education to improve communications and is a member of the Preston Memorial Hospital Auxiliary (Buckwheat Ex. 4).

21. Buckwheat proposes auxiliary power capability (Buckwheat Ex. 2).

Comparative Coverage

22. The following table summarizes the areas and populations proposed to be served by WFSP, Preston and Buckwheat.

	Area (Square Miles)	*Population* (1980 Census)
WFSP–Total	621.3	37,741
Preston–Total	573.1	43,945
Buckwheat–Total	518.3	31,349
Common to all three applications	378.0	25,466
Common to Preston & WFSP	51.2	5,037
Common to WFSP & Buckwheat	122.0	5,365
Exclusive to Preston	143.9	13,442
Exclusive to Buckwheat	18.3	518
Exclusive to WFSP	70.1	3,873

(Joint Ex. 1).

23. The area involved receives 5 or more primary aural daytime services. The following table shows the availability of nighttime primary aural services in the uncommon area of all of the applicants to be served by each applicant:

APPLICANT	*EXISTING SERVICE*	*AREA (Square miles)*	*POPULATION (1980 Census)*
WFSP	3	14.6	833
	4	90.0	3,411
	5 or more	138.7	10,031
PRESTON	3	3.9	69
	4	21.5	803.5
	5 or more	169.7	17,606.5
BUCKWHEAT	3	9.8	257
	4	40.7	1,728
	5 or more	89.8	3,898

(Joint Ex. 1).

Conclusions

24. The standard comparative issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communication.

Diversification

25. Buckwheat's principals have no ownership interests in any medium of mass communications. In addition, Preston stockholder Spencer Everly's stockholdings in Comsat are too small to be of consequence to the objectives of diversification and thus are not cognizable for comparative purposes. See *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (Rev. Bd. 1983); *Gainseville Media, Inc.*, 42 RR 2d 489, 497 (Rev. Bd. 1978). By contrast, WFSP is the licensee of the only broadcast station located in Kingwood. In determining what weight to accord a media interest under the diversification criterion, the Commission considers media interests within the principal community to be served to be of the greatest significance. *Policy Statement, supra.* WFSP argues that Buckwheat and Preston should receive only a very slight preference on the diversification factor since Kingwood is already "multi-serviced." WFSP's contention that Kingwood is "multi-serviced" is contrary to the findings (see paragraph 4, *supra*). However, even if true, Buckwheat and Preston's advantage would not be diminished since they, unlike WFSP, would provide a new voice. *Golden State, supra.*[6] It is clear that Preston and Buckwheat are entitled to a substantial preference *vis a vis* WFSP.

[6] No differentiation has been made in this proceeding between those stockholders who live in Washington, D. C. and those who live in the surrounding suburbs because the community to be served by a television facility in the Washington market includes the suburbs. In addition, all of Washington, D. C. and its suburbs will receive a city grade signal under all proposals.

Golden State, supra; *Multiplex Communications, Inc.*, 54 RR 2d 733 (Rev. Bd. 1983).

Best Practicable Service

Integration

26. All three applicants propose 100% full-time integration. WFSP attempts to undermine Spencer K. Everly, Jr.'s (Preston 51% stockholder) integration proposal on the grounds that he would devote considerable time to technical aspects of the station as Director of Engineering. However, the position of Chief Engineer is considered to be a management level position. *Absolutely Great Radio, Inc.*, 55 RR 2d 15, 22 (1983); *Grand Broadcasting Co.*, 36 FCC 925, 930 (1964). Moreover, the preponderance of Mr. Everly's time will be devoted to his position as Program Director, which is explicitly recognized in the *Policy Statement, supra*, 1 FCC 2d at 395. Likewise, the position of General Manager, which is to be held by Mrs. Everly (Preston's 49% stockholder) is also recognized in the *Policy Statement, supra*, 1 FCC 2d at 395. Preston will receive 100% quantitative integration credit. WFSP and Preston attack the integration credit sought for Ms. Calvert, who with Ms. Garlitz, will jointly own Buckwheat's proposed station. The attacks are without substance and are rejected. Ms. Calvert, like Mrs. Everly, will serve as General Manager, which, as noted, *supra*, is explicitly recognized in the *Policy Statement.* Ms. Calvert's duties include being in charge of the station's business and financial aspects, a position usually filled by a business manager. The role of a business manager is also credited in the *Policy Statement* as being a significant policy-making position. In fact, despite Preston's protestations, Mrs. Everly's proposed role with Preston appears to be strikingly similar to that proposed for Ms. Calvert. It is noteworthy that Buckwheat, like Preston, proposes a staff of less than 5 full-time employees, two of whom are its principals. The facility sought is a Class A FM station located in a small community with a population of 2,877 (1980 U.S. Census, official notice taken). It is clear that Ms. Calvert, as well as Ms. Garlitz, will play an important, policy making role in running the "Mom and Pop" operation. Buckwheat is entitled to 100% quantitative integration credit. No challenge has been made to WFSP's integration proposal and WFSP, like Buckwheat and Preston, will receive 100% quantitative integration credit.

27. Since the applicants are quantitatively equal, resolution of the integration preference rests on examination of the qualitative attributes of the applicants. WFSP receives moderate enhancement credit for Mr. George's residence in Kingwood and his past participation in civic affairs.[7]

[7] Residence and participation in civic affairs is treated herein as a single enhancement feature, consistent with the approach followed by the Commission in *Waters B/Casting*

WFSP's enhancement credit is deemed moderate rather than substantial since Mr. George's sole local activity since approximately 1977 consists of membership on the Board of Directors of the Preston Country Club. Similarly, Preston will be given moderate enhancement credit. While Mr. and Mrs. Everly are long-time residents of Kingwood, their civic involvement is not so distinguished as to warrant substantial enhancement credit. Buckwheat also receives moderate enhancement credit under the residence and civic participation rubric. Ms. Garlitz' participation in the civic affairs of Kingwood is far more impressive than that of WFSP's and Preston's principals. Ms. Calvert is a resident of Newburg, approximately thirteen miles from Kingwood, and within Buckwheat's proposed service area. Although residence in the principal community to be served is of primary importance, it is closely followed by residence within the proposed service area. *Waters, supra.* Ms. Calvert's civic involvement in Newburg is equally impressive. In addition, her services on behalf of Preston County clearly impacts on Kingwood. In sum, if Ms. Calvert was a resident of Kingwood, Buckwheat would be given a substantial enhancement credit. Since she is not, Buckwheat will be given only a moderate enhancement credit. *Waters, supra.*

28. Buckwheat also receives substantial enhancement credit for 100% female participation. *Waters, supra; Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983). Preston proposes only 49% female ownership. The controlling interest (51) is held by Mr. Everly. Preston argues that the respective interests should be ignored since the Everlys are husband and wife and plan on making corporate decisions by consensus. However, as pointed out by Buckwheat, had Preston wished to give each of its two principals an equal voice in the operation and management of the station, it could have done so prior to the "B" cut-off date. It would be an impermissible upgrading of Preston's comparative position to give Preston credit for Mrs. Everly having more than a minority interest in the applicant. The general threshold for awarding significant credit for female ownership is a controlling interest. *Horne, supra.* However, while comparatively inferior, Preston's female involvement is entitled to some weight. Preston will be given slight enhancement credit.[8] WFSP is

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Corporation, 91 FCC 2d 1260 (1982). In *Radio Jonesboro, Inc.*, 55 RR 2d 991 (Rev. Bd. 1984), the Board treated residence and civic participation as separate enhancement features. However, that case is distinguishable because of the unusual fact situation. The Presiding Judge does not read *Radio Jonesboro* to apply to the usual fact situation, *i.e.*, where the integrated principal is a resident of the proposed community or within the proposed service area.

[8] In *North Carolina Radio Service, Inc.*, 52 RR 2d 993 (Rev. Bd. 1982), the Board gave an applicant moderate enhancement credit based on the size of its female ownership (49%) and the importance of the managerial position (general manager). However, that determination was prior to *Horne.* An award of moderate enhancement credit appears to

entitled to substantial enhancement credit for Mr. George's experience as General Manager of WFSP since 1969. Mr. Everly's claimed experience (described in paragraph 10) is too inconsequential to warrant any enhancement credit. WFSP's prior broadcast experience is clearly comparatively superior. However, previous broadcast experience is an enhancement factor of "minor significance." *Policy Statement, supra; North Carolina Radio, supra.*

29. In summary, all three applicants receive moderate enhancement credit for residence and civic participation. Buckwheat receives substantial enhancement credit for female participation and Preston receives slight enhancement credit. WFSP receives substantial enhancement credit for prior broadcast experience. However, as noted, *supra*, prior broadcast experience is an enhancement factor of "minor significance." On the basis of Buckwheat's superiority because of its 100% female participation Buckwheat will be given a moderate to substantial integration preference over WFSP and a moderate integration preference over Preston.

Comparative Coverage

30. Preston proposes service to 6,402 more persons than WFSP and 12,596 more persons than Buckwheat. However, all of the population proposed to be served by Preston receives 5 or more primary aural daytime services. Preston will be awarded a very slight preference over WFSP and Buckwheat. *Family Broadcasting Group*, 93 FCC 2d 771 (Rev. Bd. 1983). In service to relatively underserved areas at night, WFSP and Buckwheat enjoy an advantage over Preston. WFSP proposes to provide a fourth service to 833 persons and a fifth service to 3,411. Buckwheat would provide 257 persons with a fourth service and 1,728 with a fifth. Preston proposes a fourth service to 69 persons and a fifth service to 804 persons. WFSP is awarded a slight preference over Preston and a very slight preference over Buckwheat and Buckwheat receives a very slight preference over Preston for proposing service to more underserved areas. *Radio Jonesboro, Inc., supra.* Overall, WFSP will be awarded a very slight comparative coverage preference over Preston and Buckwheat. As between Preston and Buckwheat, neither one enjoys an advantage.

Final Comparative Evaluation

31. Preston and Buckwheat have been given a substantial diversification preference over WFSP. Buckwheat has been given a moderate to substantial integration preference over WFSP and a moderate integration preference over Preston. WFSP has been given a very slight comparative coverage preference over Buckwheat and Preston. Buckwheat and

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be inconsistent with *Horne* particularly where, as here, the competing applicant proposes 100% female involvement.

Preston are also entitled to a very slight preference over WFSP for their proposals to install an auxiliary source of power. *Communications Properties, Inc.*, 52 RR 2d 981, 984 (Rev. Bd. 1982); *Bradley, Hand and Triplett*), 89 FCC 2d 657, 664 (Rev. Bd. 1982). Preston and Buckwheat's substantial diversification preference eliminates WFSP as a contender. As between Buckwheat and Preston, since Buckwheat enjoys a moderate integration preference, it is concluded that the public interest is better served by a grant of Buckwheat's application. The ranking of the applications is as follows: (1) Buckwheat, (2) Preston, and (3) WFSP.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Buckwheat Broadcasting Company IS GRANTED and the applications of WFSP, Inc. and Preston Communications, Inc. ARE DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Comparative Hearing
FM Station, Authorization
Local Residence
Minority Ownership
Ownership and Management, Integration of

Review Board affirmed Initial Decision and granted comparative applicant proposing 100% minority ownership participation in management. Winner received integration credit for 85% owner who would reside during work week in proposed community but would commute on weekends to be with her family, 63 miles away. —*WRLJ, Inc.*
BC Docket No. 82-312

FCC 84R-43

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WRLJ, Inc. Cape May Court House, New Jersey	BC Docket No. 82-312 File No. BPH-801231AC
Canruss, Inc. Cape May Court House, New Jersey	BC Docket No. 82-313 File No. BPH-810326AE
Mary B. McCusker & Dorothy L. Simpkins d/b/a Bay Broadcasting Company Cape May Court House, New Jersey	BC Docket No. 82-315 File No. BPH-810629AD
For Construction Permit for a New FM Station	

Appearances

David S. Landis and *Roy F. Perkins, Jr.* on behalf of Canruss, Inc.; and *Mark E. Fields* on behalf of Bay Broadcasting Company.

DECISION

Adopted: June 11, 1984; Released: June 14, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. After reviewing Administrative Law Judge Chachkin's Initial Decision, FCC 84D-11, released February 23, 1984, which was challenged in exceptions, briefs, and oral argument held May 31, 1984, the Review Board adopts the ALJ's findings of fact and conclusions of law and affirms his ultimate conclusion that an FM broadcast construction permit should be awarded to Canruss, Inc. because of its comparative superiority over Bay Broadcasting Company. *See generally Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, No. 82-2513 (D.C. Cir. May 25, 1984).

2. The only substantial exception raised by Bay is to the ALJ's acceptance of the full-time integration proposal of Canruss' 85% owner, Candida Diaz de McBride.[1] Mrs. McBride, who currently lives with her family in Wilmington, Delaware, intends to establish a residence in Cape May Court House and to commute to Wilmington on weekends to be with her family. We agree with the ALJ (*I.D.*, para. 24) that Mrs. McBride's proposal should be credited because it is unrebutted by other evidence and Bay's objection to its likelihood of effectuation rests solely on speculation and non-existent policy grounds. Moreover, contrary to Bay's suggestion, the language that full-time participation is "necessarily" accompanied by residence in the area (*Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 n. 7 (1965)) has never been read to *require seven-day a week* residence. *Cf. Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 515-16 (Rev. Bd. 1982). Accordingly, we agree with the ALJ that both applicants are entitled to the award of 100% full-time credit for the participation of their ownership in management and that the case therefore turns on their qualitative enhancement attributes. See *Waters, supra.*

3. Canruss receives slight local residence enhancement credit for a 15% owner's brief residence in the service area and for the proposed move of all its principals to the community of license, whereas Bay receives slight credit for a 50% owner's past residence and civic activity in the service area and for the proposed move of all its principals to the service

[1] WRLJ, Inc. has not filed exceptions to the *I.D.'s* denial of its application; accordingly, we will dismiss its application with prejudice for failure to prosecute. *See* Section 1.276(f) of the Rules, 47 CFR §1.276(f).

area. These credits are essentially offsetting. Both applicants are equal proposing 100% female ownership participation. Bay has a very slight advantage for its 50% owner's brief, non-managerial broadcast experience. But Canruss receives a substantial minority enhancement preference because it proposes 100% minority ownership participation whereas Bay has no minority owners. See *Waters, supra; Horne Industries, Inc.*, 94 FCC 2d 815, 822-28 (Rev. Bd. 1983). Summing up the differences Canruss receives a slight overall preference for participation of ownership in management which is reinforced into a clear overall comparative preference because Canruss is also entitled to a slight comparative coverage preference. *See CJL Broadcasting, Inc.*, 88 FCC 2d 750, 757-8 (Rev. Bd. 1981), *modified on other grounds*, 54 RR 2d 1037 (1983); *FBC, Inc.*, 95 FCC 2d 256 (Rev. Bd. 1983).

4. ACCORDINGLY, IT IS ORDERED, That the application of Canruss, Inc. (File No. BPH-810326AE) for authority to construct a new FM broadcast station to operate on Channel 288A at Cape May Court House, New Jersey IS GRANTED, the application of Bay Broadcasting Company (File No. BPH-810629AD) IS DENIED, and the application of WRLJ, Inc. (File No. BPH-801231AC) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WRLJ, Inc. Cape May Court House, New Jersey	BC Docket No. 82-312 File No. BPH-801231AC
Canruss, Inc. Cape May Court House, New Jersey	BC Docket No. 82-313 File No. BPH-810326AE
Mary B. McCusker & Dorothy L. Simpkins d/b/a Bay Broadcasting Company Cape May Court House, New Jersey	BC Docket No. 82-315 File No. BPH-810629AD
For Construction Permit for a New FM Station	

Appearances

Russell C. Powell and *Jeffrey P. Southmayd*, on behalf of WRLJ, Inc.; *Roy F. Perkins, Jr.* on behalf of Canruss, Inc.; *Jerrold Miller, Samuel Miller* and *Mark Fields*, on behalf of Bay Broadcasting Company; and *Robert Zauner* on behalf of the the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: February 17, 1984; Released: February 23, 1984

Preliminary Statement

1. By *Hearing Designation Order*, 47 Fed. Reg. 26703, published June 21, 1982, the Commission, by the Chief, Broadcast Bureau, designated the applications of WRLJ, Inc. (WRLJ), Canruss, Inc. (Canruss), WSDY Radio (WSDY),[1] Bay Broadcasting Company (Bay) and Gilbert Broadcast-

[1] The application of WSDY was dismissed with prejudice, by *Order* of the Presiding Judge, FCC 82M-4072, released December 23, 1982.

ing Company (Gilbert),[2] for hearing on the following issues.

1. To determine with respect to WRLJ:

(a) the source and availability of additional funds over and above the $35,810 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by WRLJ would constitute a hazard to air navigation.[3]

3. To determine with respect to Canruss:

(a) the source and availability of additional funds over and above the $49,540 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[4]

4. To determine with respect to Bay:

(a) the source and availability of additional funds over and above the $10,708 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[5]

5. To determine pursuant to Section 73.1125, whether good cause exists for Bay's proposed location of its main studio outside the proposed community of license.

6. To determine with respect to Gilbert):

(a) the source and availability of funds to meet estimated costs; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[6]

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

In addition, the designation order noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Therefore, the designation order specified that the areas and

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[2] As discussed, *infra*, the application of Gilbert was dismissed with prejudice, by *Order* of the Presiding Judge, FCC 84M-789, released February 15, 1984.

[3] Issue 2 was summarily resolved in favor of WRLJ (see *Order*, FCC 82M-3515, released November 8, 1982).

[4] Issue 3 was summarily resolved in favor of Canruss (see *Order*, FCC 82M-3431, released November 2, 1982).

[5] Issue 4 was summarily resolved in favor of Bay (see *Order*, FCC 82M-3110, released October 7, 1982).

[6] The issue is moot in light of the dismissal of Gilbert's application.

populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue.

2. A prehearing conference was held on August 9, 1982. Hearing sessions were held on November 12, 16, and 17, and December 7 and 10, 1982. The record was closed by Order, FCC 83M-1074, released April 1, 1983. Proposed findings of fact and conclusions of law were filed on February 24 and 25 and reply findings and conclusions were filed on March 17, 1983. By *Order*, FCC 83M-2232, released July 12, 1983, the record was reopened to reflect that Canruss principal Monica E. McBride had moved from Cape May Courthouse to Cape May, New Jersey and reclosed. By *Order*, FCC 83M-4332, released November 23, 1983, the Presiding Judge granted petitions filed by Canruss on September 2 and 16, 1983 and reopened the record and added the following issues against Gilbert:

> To determine the facts and circumstances relating to the allegations of the illegal purchase and use of a television converter box by Harry Gilbert;
>
> To determine whether Harry Gilbert violated Section 605 of the Communications Act;
>
> To determine on the basis of the evidence adduced on the foregoing issues, the effect upon the basic or comparative qualifications of Gilbert Broadcasting Company Limited Partnership to be a licensee of the Commission.

On the basis of an agreement reached with the parties at a conference held on November 28, 1983, a procedural schedule for the trial of the added issues was established including a hearing date on January 31, 1984. On January 27, 1984, Canruss and Gilbert filed a "Joint Request For Approval Of Agreement And Dismissal Of Application" providing for the dismissal of Gilbert's application. By *Order*, FCC 84M-789, released February 15, 1984, the settlement agreement was approved, Gilbert's application dismissed mooting trial of the added issues, and the record reclosed.

Findings of Fact

Financial Qualifications Issue (WRLJ)

3. The Broadcast Bureau's hearing designation order noted that WRLJ, Inc. would require $36,335 to construct the proposed station and operate it for three months. *See, Hearing Designation Order* (H.D.O.) at page 2, paragraph 2. WRLJ, Inc. planned to finance this monetary need with $35, 810 in cash deposited in its corporate checking account. See H.D.O. at page 2, paragraph 2. Thus, WRLJ's financing was "short $525" and on appropriate issue was designated. *See*, H.D.O. at page 2, paragraph 2.

4. In order to overcome this cash deficiency of $525, WRLJ amended its application on November 9, 1982 to substitute a $50,000 loan from Mr.

Andrew Stamat, President of WRLJ, Inc., in place of its earlier reliance on $35,810 in cash in its corporate account.[7] This loan would come from the proceeds of a personal loan to Mr. Stamat from United Jersey Bank Mid State (UJB). (WRLJ Ex. No. 3, p. 1). WRLJ relies upon the $50,000 loan from Mr. Stamat to meet its proposed construction and operating costs of $36,810. (WRLJ Ex. No. 3, p. 1). WRLJ will not be required to make an initial payment on the loan from Mr. Stamat until one year after the date its proposed FM station commences operation (WRLJ Ex. No. 3, p. 2). Mr. Stamat will use the $50,000 UJB loan exclusively for providing these funds to WRLJ for its proposed Cape May Court House FM station (Tr. 443). The loan is earmarked specifically by Mr. Stamat for this purpose (Tr. 348, 444-45). There are no long term nor contingent liabilities that would preclude Mr. Stamat from this commitment (Tr. 348, 438-439).

5. The UJB loan to Mr. Stamat is memorialized in a letter from Daniel A. Slocum, Assistant Vice President (WRLJ Ex. No. 3, p. 3). The letter, addressed to Andrew Stamat, stated:

> Based on your past and present relationship with our bank we would be willing to make a loan to you in the amount of fifty thousand dollars. The loan would be payable over a period of five years, as an interest rate of prime plus two percent.
>
> This offer is subject to United Jersey Bank Mid State receiving sufficient security for the loan and upon final approval of our loan committee.

6. Mr. Stamat has had a number of past dealings with UJB and Mr. Dan Slocum as Station Manager of WVRM (FM), Hazlett, New Jersey (Tr. 455). Moreover, Mr. Stamat and Mr. Slocum are known to each other through Mr. Stamat's personal checking account with UJB (Tr. 457). Mr. Slocum frequently visits Mr. Stamat at WVRM (FM) on business (Tr. 461). Mr. Stamat has also in the past taken out another loan from UJB and has established a loan relationship with the bank (Tr. 458). The bank was told by Mr. Stamat prior to the issuance of the loan letter that the proceeds would be transferred to WRLJ for the construction of the proposed Cape May Court House FM station (Tr. 460). The bank did not specify what security, if any, it would require to secure the loan (Tr. 460; WRLJ Ex. No. 3, p. 5). However, Mr. Stamat has agreed to provide whatever security UJB may require for the loan (Tr. 440). Mr. Stamat would secure co-signers through his family if the bank so requires (TR. 442). Mr. Stamat would also agree to give UJB a security interest in the assets and/or stock of WRLJ to secure the loan (Tr. 506).

Main Studio Issue (Bay)

7. Issue 5 requires a determination, pursuant to Section 73.1125, whether good cause exists for Bay's proposed location of its main studio

[7] This amendment was accepted by an *Order* issued on December 1, 1982 (FCC 82M-3836, released December 3, 1982).

outside the proposed community of license. By amendment filed July 20, 1982, Bay changed its proposed main studio location to "in Cape May Court House." The amendment was accepted by *Order*, released August 11, 1982, FCC 82M-2436.

Comparative Issues

WRLJ, Inc.

8. Andrew William Stamat is the president, director and 100 percent stockholder of WRLJ. He will be the manager, full-time, of the station proposed by WRLJ at Cape May Court House (WRLJ Ex. 1, p. 1). Mr. Stamat has no interest in any other broadcast station or medium of mass communications (WRLJ Ex. No. 1, p. 1).

9. Mr. Stamat lives at Edison, New Jersey. He was born in January 1955 at New Brunswick, New Jersey. He graduated from high school in Edison, New Jersey, in 1973 (WRLJ Ex. No. 1, p. 1, 2, 4). In 1975-6 he attended classes in psychology at Middlesex Community College, Edison, and in the summer of 1976 attended a class in public speaking at Rutgers University, New Brunswick, New Jersey (WRLJ Ex. No. k, p. 4). Mr. Stamat was employed as a security guard at New Brunswick, New Jersey, from August 1980 to January 1981. He was a part-time employee at Station WVRM, a non-commercial, educational FM station at Hazlett, New Jersey, engaged in gathering, writing and editing news, from December 1979 to February 1981. In the period January 1980 to August 1980 he also was an announcer at WVRM from midnight to 6 a.m. In February 1981 he became program director, full-time, of WVRM. In March 1982 he became the station manager, full-time, of WVRM, in which position he has continued to the present (WRLJ Ex. No. 1, p. 4-6). In the event of a grant of the application of WRLJ, Mr. Stamat will terminate his employment at Station WVRM and move to Cape May Court House (WRLJ Ex. No. 1, p. 7, 8).

10. WRLJ proposes to utilize an auxiliary power generator (WRLJ Ex. No. 1, p. 8; Tr. 558-9, 648). WRLJ will have separate studio and transmitter sites: the main studio will be in Cape May Court House with the transmitter site 3½ to 5 miles distant (Canruss Ex. 10; Tr. 705). This means that WRLJ's proposed station will be subject to being off the air from a commercial power failure at either location (or at both). The single auxiliary power source proposed by WRLJ cannot guarantee continuity of operation under this circumstance. With a single auxiliary power source, the station will be subject to being off the air from commercial power failures to the same extent as a station with a single, co-located studio and transmitter site and no auxiliary power source (Canruss Ex. No. 4; Tr. 684-7).

Canruss, Inc.

11. The officers, directors and stockholders of Canruss, Inc., are as follows (Canruss Ex. No. 1):

Candida Diaz de McBride	President Treasurer	Director	85 percent
Monica E. McBride	Vice President Secretary	Director	15 percent
Russell W. McBride		Director	

Russell W. McBride is the husband of Candida Diaz de McBride; Monica E. McBride is their daughter (Canruss Ex. No. 2, p. 1). Mrs. McBride, Mr. McBride and Monica McBride have no interests in any other broadcast station or medium of mass communications (Canruss Ex. Nos. 1 and 2).

12. Mrs. McBride will be the general manager, full-time, of the station proposed by Canruss at Cape May Court House (Canruss Ex. No. 1, p. 2). She will be in overall charge of all phases of operation including station policies, budget, format, hiring and firing, special programming, local live programming, scheduling, sales, billing, technical maintenance, and news (Canruss Ex. No. 1, p. 2). Mrs. McBride lives in Wilmington, Delaware. She is a Hispanic person. She was born Candida Eloisa Diaz Aldana in Guatemala City, Guatemala in 1933, where she was raised. Mrs. McBride's family had lived in Guatemala for many generations and she was a citizen of Guatemala. She moved to the United States as a permanent resident in 1954 and is a naturalized American citizen. She has had executive and management experience of various kinds including initiating and serving as managing editor of a small newspaper (Canruss Ex. No. 1; Tr. 217-218). She is not presently employed (Tr. 224). Her studies of broadcast station management and operation consisted of 14 tutorial sessions of 2½ to 4 hours each (plus reading assignments) in the period January through April 1982. When the McBrides found that there was no course being taught at the time meeting their needs, they arranged for a course to be prepared and taught by the program director (now manager) of AM and FM broadcast stations in Wilmington, Delaware. He prepared the course outline, in consultation with persons at the University of Delaware, and was paid by Mrs. McBride for the course (Canruss Ex. No. 1, p. 4; Tr. 214-6, 229-31).

13. Mr. and Mrs. McBride have six children living at their home in Wilmington, Delaware, ranging in age from 12 to 20 years (Tr. 202). The 20 year old is a daughter who recently returned home from employment in Texas; she plans to take some post-high school courses such as accounting (Tr. 221-2). Mr. McBride holds a lucrative position as Director of Management Training and Career Development for ICI America, a position which he enjoys. He normally works on the order of a ten hour day; he sometimes works on weekends but a lot of his work can be and is

done at home. Mr. McBride and the children will continue to reside at the McBride's home in Wilmington (Tr. 206-7, 220-1). Mrs. McBride will establish a residence at Cape May Court House, which probably also will be the residence of Monica McBride and her daughter. The residence at Cape May Court House will be her family's residence as well as hers, in the same way that the Wilmington residence also will continue to be a residence of hers (Tr. 207-8, 218-9). Mrs. McBride has not had a separate residence in the past because there has been no reason to do so (Tr. 208). Mrs. McBride testified that there will be no difficulty in the care of Mr. and Mrs. McBride's children. The five younger children attend school full-time (Tr. 202). The McBrides have live-in help at their home (Tr. 207, 220). In addition, Mr. McBride will be living at that home as well as their 20 year old daughter; Mrs. McBride's mother visits from Guatemala and lives there two or three months approximately every year. Mrs. McBride will commute to Wilmington on weekends or, when necessary, Mr. McBride and the children will visit her on weekends at Cape May Court House (Tr. 207-8, 220-2). The distance from Cape May Court House to the western city limits of Wilmington is approximately 63 miles (official notice taken).

14. Monica E. McBride will be the operations manager, full-time, of the station (Canruss Ex. No. 2, p. 1). She will be in charge of daily operations subject to the overall authority of the general manager and will exercise the functions of station manager during absences of the general manager (Canruss Ex. No. 2, p. 1). Monica McBride was born in February 1960 and also considers herself to be Hispanic. Being the daughter of a Hispanic person has played a large part in her upbringing. She has been to Guatemala several times. Her grandmother, who lives in Guatemala, visits and lives with the McBrides for two or three months approximately once a year. She speaks Spanish not only with her relatives but with other Hispanics. She holds herself out to the public as a Hispanic person, a matter of personal pride with her (Tr. 207, 220, 225-6). Monica McBride's studies in broadcast station management and operation consisted of the same course in those subjects as taken by her mother, as previously described (Canruss Ex. No. 2, p. 2; Tr. 215, 227). Her previous paid work experience has been as a waitress (Tr. 227, 237). Ms. McBride did not pay for the stock in Canruss which was issued to her. The stock which was a gift from her family, was originally held by Mr. McBride (Tr. 240, 252, 255-56).

15. In April 1982, Ms. McBride moved to Wildwood, New Jersey, within the 1 mv/m area of Canruss' proposed station. She moved to Cape May Court House in May 1982 and lived there until April 1983, when she moved to Cape May. In the event of a grant of Canruss' application, she intends to move to Cape May Court House (Canruss Ex. No. 2; *Order*, FCC 83M-2232, released July 12, 1983). Monica McBride is divorced and

has a three year old daughter (Tr. 235). She was included as an owner because she expressed great enthusiasm in becoming involved with Canruss and its proposed station (Tr. 255-6). Her commitment to be employed full-time at Canruss' station is a permanent one (Tr. 244). She testified in this regard, as follows (Tr. 237):

> [T]his would be an excellent opportunity for me to, you know, get into a profession and learn the skill from there. * * I can foresee no reason why I would leave this chance of a lifetime behind to go somewhere else.

Her daughter has been with her during her residence in the Cape May area. She will rely on friends or employ someone to watch her daughter while she is working at the station; she also expects to bring her daughter to the station occasionally. Based on her previous experience while employed full-time, she anticipates no problem in arranging for her daughter's care when she is at the station (Tr. 235-6, 242-3).

16. The station proposed by Canruss will have auxiliary power generating facilities at its studio and transmitter sites. This will permit Canruss' station to continue broadcasting under any combination of local power failures (Canruss Ex. No. 1, p. 4; also Canruss Ex. No. 4, pp. 2-3).

Bay Broadcasting Company

17. Bay is a partnership composed of two equal partners (50 percent each), Dorothy L. Simpkins and Mary B. McCusker (Bay Ex. No. 4). Mrs. Simpkins proposes to be the general manager, full-time, of the station proposed by Bay at Cape May Court House. Mrs. McCusker proposes to be the sales manager, full-time, of the station (Bay Ex. No. 3). Bay and its principals do not have interests in any media of mass communications (Tr. 283, 300).

18. Mrs. Simpkins was born in November 1941 at Trenton, New Jersey. She graduated from Dover High School, Dover, New Jersey, in 1959. She worked in a credit department in Dover from 1959 to 1965. In December 1975 she moved to Sea Isle City, New Jersey, where she was active in the PTA, serving as vice president in 1978 and 1979, and as president in 1980-1981. In her PTA project she worked with the Vo-Tech school at Cape May Court House as well as the Wetlands Institute at Stone Harbor. She also served on the church council of the Messiah Lutheran Church for a year commencing in December 1980. The foregoing communities are within the primary service area of Bay's proposed station (Bay Ex. No. 2). In the event of a grant of Bay's application, Mr. and Mrs. Simpkins and their three children will move from their present home in Columbia, South Carolina to Sea Isle City, New Jersey, where they also own a home (Tr. 266, 272). Sea Isle City is approximately 8.8 miles from Cape May Court House (Canruss Ex. No. 8).

19. Mrs. Simpkins has some broadcast experience. She was a part-time employee of Station WSLT, Ocean City, New Jersey (1979-1980), handling

billing in the traffic department. Since moving to South Carolina in 1981, she has been employed by Station WXRY, Columbia, South Carolina, working in the traffic department. She is in charge of logging commercials for airing and billing. She plans to continue this employment until favorable action on Bay's application (Bay Ex. No. 2, p. 2).

20. Mrs. McCusker was born in June 1930 in Philadelphia, Pennsylvania. She graduated from high school at St. Leonard's Academy in 1953. Thereafter, she worked for the Bell Telephone Company, overseeing insertion of advertisements and listings in the telephone directory, until 1957. From 1975 to 1978 she was a salesperson for a toy company engaged in retail sales, in 1976 she became sales manager, with responsibility for five salespersons (Bay Ex. No. 1). She successfully completed a real estate course in 1979. She is now a student at Bishop Newman College in Aston, Pennsylvania, majoring in business and human behavior (Bay Ex. No. 1, p. 1-2). Mrs. McCusker, her husband and their five children, ages 12 to 23 years, reside at New Town Square, Pennsylvania, about 10 miles northwest of Philadelphia. In the event of grant of Bay's application, Mr. and Mrs. McCusker and their children will move to a home which they own at Sea Isle City, New Jersey. Mr. McCusker would commute daily to his employment at Balacynwyd, Pa.; the driving time from Sea Isle City to Balacynwyd is about 1¼ hours. Mrs. McCusker plans to continue her college education by attending courses nighttime at a college in the Cape May Court House area (Tr. 287, 290-1, 295-8).

Comparative Coverage

21. There is no significant difference between the areas and populations that each of the applicants would serve during daytime operation (Tr. 419). WRLJ will provide the fourth aural nighttime service to 1,536 persons residing in an area of 0.75 square miles within the limits of Cape May City (Stipulation No. 1). Canruss will provide a third aural nighttime service to an area within the city limits of Cape May, New Jersey, consisting of 1.08 square miles and 2,212 persons. Canruss will also provide a fourth nighttime service to 0.84 square miles of Cape May, containing 1,720 persons (Canruss/Gilbert Jt. Ex. No. 1).

Conclusions

Financial Qualifications Issue (WRLJ)

22. WRLJ relies on a $50,000 loan from its President, Andrew Stamat, to meet its proposed cost figure of $36,335. This loan would come from the proceeds of a personal loan to Mr. Stamat from United Jersey Bank Mid State. WRLJ will not be required to make an initial payment on the loan from Mr. Stamat until one year after the date its proposed FM station commences operation. Mr. Stamat will use the $50,000 bank loan

exclusively for providing the proceeds to WRLJ pursuant to his loan commitment. Mr. Stamat has no long term nor contingent liabilities which would preclude the bank loan funds from being provided to WRLJ. Bay and Canruss do not question Stamat's willingness and ability to use the proceeds from the bank for the proposed radio station. They claim, however, that WRLJ has not established the reasonable availability of the bank loan to Stamat since the loan letter does not specify the security the bank will require and there is no evidence that the bank has knowledge of security available to Stamat or that it would be satisfied with it. Also, Canruss urges that the bank letter requires "final approval of our loan committee." These contentions are rejected. A present, firm intention to make a loan, future conditions permitting, is the essence of the "reasonable assurance" standard. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166 (1980); *Multi-State Communications, Inc.* v. *FCC*, 590 F.2d 1117 (D.C. Cir. 1978). The bank letter indicates a present, firm intention to make the loan and the terms of repayment are specified. Read as a whole, the bank letter reflects the required commitment. The inclusion of precautionary provisions such as final approval of the loan committee and unspecified collateral does not change this conclusion. "For a bank to base its final decision on conditions existing at the time a grant is actually made is a common business practice which does not in and of itself make reliance on the commitment unjustified" *Merrimack, supra*, 82 FCC 2d at 167. Moreover, the record makes clear that Stamat is not a stranger to the bank. He has a personal checking account with the bank; has, in the past, taken out a loan with the bank; and has an ongoing, day-to-day business relationship with the bank in connection with his position as station manager at WVRM(FM). Accordingly, the bank loan will be credited. Since WRLJ, has shown it has available sufficient funds to meet its construction and operating costs, the financial issue against WRLJ (issue 1) is resolved in its favor.

Main Studio (Bay)

23. Issue 5 requires a determination whether good cause exists for Bay's proposed location of its main studio outside the proposed community of license. Bay has changed its proposed main studio location to a site in Cape May Court House. Therefore, issue 5 is resolved in Bay's favor.

Comparative Issues

24. This issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communication. The diversification criterion is of no significance in this

case since none of the applicants own media interests. With regard to the best practicable service criterion, each of the applicants proposes 100% full-time integration. Bay urges that Candida McBride's proposal to establish a separate residence in Cape May Court House is "unrealistic" and "unlikely to be effectuated." Contrary to Bay's assertion, the separation of a parent (male or female) from the rest of the family to pursue a business opportunity is not unheard of in this day and age. Moreover, the evidence makes clear that the children, all of whom are 12 years or older, will be well taken care of in their Wilmington, Delaware home. Also, Mrs. McBride intends to commute on weekends to Wilmington. In addition, the distance from Cape May Court House to Wilmington is not very great (approximately 63 miles). Bay's contention rests solely on speculation and conjecture. No evidence has been offered which undermines Mrs. McBride's stated intention to move to Cape May Court House and serve full-time as general manager. Bay also faults Canruss' integrated principals for their lack of prior broadcast experience. However, it is a fundamental premise that lack of broadcast experience is remediable. *Policy Statement, supra,* 1 FCC 2d at 396, footnote 8. There is no basis for questioning an integration proposal merely because it is proffered by a newcomer to broadcasting. Moreover, Mrs. McBride's prior executive and management experience including acting as editor of a small newspaper would appear to amply prepare her for her position as general manager. Also, the commitments of Candida and Monica McBride are manifested by their studies in small-market broadcast station management and operation, which they arranged and for which Mrs. McBride paid. The applicants including Canruss will receive 100% full-time quantitative integration credit.

25. Since the applicants are quantitatively equal, the qualitative attributes of the applicants are of prime importance. Stamat's broadcast experience is of relatively brief duration and includes limited management level involvement. Therefore, WRLJ receives only slight enhancement credit for Stamat's past broadcast experience. WRLJ receives no credit for local ownership. However, Stamat has stated he intends to move to Cape May Court House. Proposed future local residence is also accorded weight, although to a lesser extent than present local residence. *Policy statement,* 1 FCC 2d at 396. Canruss' principals are Hispanic women. Bay's contention that Monica McBride has not established any basis for minority enhancement is rejected. Ms. McBride, Mrs. McBride's daughter, as a person with a Hispanic mother from Guatemala, clearly qualifies as a member of a minority group. Therefore, Canruss receives substantial enhancement for its 100% minority and female integration proposal. *Waters Broadcasting Corp.*, 52 RR 2d 1063 (1982). Canruss also receives very slight enhancement for Monica McBride's (15% ownership) brief

residence (since April 1982) within the proposed service area. Canruss also receives minor enhancement for Canruss' principals' proposal to move to Cape May Court House. Bay receives substantial enhancement for its 100% female integration proposal. *Waters, supra.* Bay also receives slight enhancement for Mrs. Simpkins' prior residence and participation in civic activities in communities within the proposed service area. Bay receives no credit for local residence since neither of its partners presently reside in Cape May Court House or the proposed service area. Bay also receives enhancement credit, although less than Canruss or WRLJ, for Mrs. Simpkins' and Mrs. McCusker's proposal to move to Sea Isle City. Bay also receives very slight enhancement for the brief, non-managerial broadcast experience of Mrs. Simpkins. Weighing all of the above comparative factors, and, in particular, Canruss' 100 minority and female integration proposal as opposed to Bay's 100% female integration proposal, Canruss is entitled to a moderate integration preference over Bay and a substantial integration preference over WRLJ. In addition, on the basis of its proposed 100% female ownership and management, Bay will be given a moderate integration preference over WRLJ.

26. Both Canruss and Bay are entitled to very slight preference for auxiliary power. *Bradley, Hand and Triplett*, 89 FCC 2d 657, 664 (Rev. Bd. 1982). Since WRLJ's proposed equipment is not adequate to operate the station in the event of a power failure, it receives no preference.

27. Canruss will be accorded a slight preference under the efficient use of frequency criterion because of its proposal to provide a third aural nighttime service to 2,212 persons and a fourth aural nighttime service to 1,720 persons. See *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 757-58 (Rev. Bd. 1981). WRLJ will receive a very slight preference for its proposal to provide a fourth aural nighttime service to 1,720 persons.

Final Comparative Evaluation

28. Canruss has been given a moderate preference over Bay and a substantial preference over WRLJ under the integration criterion. Canruss and Bay have received very slight preference for auxiliary power. Canruss has received a slight preference under the efficiency criterion; WRLJ has received a very slight preference under this criterion. It is, therefore, concluded that the public interest is better served by a grant of Canruss' application. The ranking of the applicants is as follows: (1) Canruss, (2) Bay, and WRLJ.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Canruss, Inc. IS GRANTED and the applications of WRLJ, Inc.

and Bay Broadcasting Company ARE DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).